1. CARDINAL HEATH v THANH 22CV0226

Judgment Debtor Examination.

The judgment debtor appeared at the initial debtor examination on May 20, 2022. The judgment creditor's counsel could not appear, and counsel requested a continuance by phone call. The court advised the judgment debtor would be out of the country until the end of July and requested a continuance to August. The court continued the matter to 8:30 a.m. on Friday, July 29, 2022, in Department Nine. May 20, 2022, minute order was served by mail to the judgment debtor and judgment creditor's counsel on May 20, 2022.

On May 23, 2022, the judgment creditor's counsel filed a notice of continuance of the examination, which was declared to have been served by mail on the judgment debtor on May 20, 2022. However, the notice incorrectly states that at the May 20, 2022, hearing the court continued the examination to June 24, 2022.

TENTATIVE RULING # 1: THE COURT SET THE HEARING OF THIS EXAMINATION FOR FRIDAY, JULY 29, 2022, AT 8:30 A.M. IN DEPARTMENT NINE. THE EXAMINATION WILL TAKE PLACE AT 8:30 A.M. ON FRIDAY, JULY 29, 2022, IN DEPARTMENT NINE.

2. MATTER OF RON 22CV0642

OSC Re: Name Change.

The mandated CLETS report is not in the court's file. (See Code of Civil Procedure, § 1279.5(f).)

TENTATIVE RULING # 2: APPEARANCES ARE REQUIRED AT 8:30 A.M. ON FRIDAY, JUNE 24, 2022, IN DEPARTMENT NINE. IF A PARTY OR PARTIES WISH TO APPEAR TELEPHONICALLY THEY MUST APPEAR BY "VCOURT", WHICH MUST BE SCHEDULED AND PAID THROUGH THE COURT WEBSITE AT www.eldorado.courts.ca.gov/online-services/telephonic-appearances.

3. DANIELS v. CROSBY HOMES, INC. PC-20190135

Plaintiff's Motion for Order Substituting Party.

Plaintiff Patrice passed away on February 21, 2022. Plaintiff Daniels, in his capacity as successor trustee of the Robert Daniels and Juliet Patrice Family Trust, moves for an order allowing him to continue the litigation as successor-in-interest to the deceased plaintiff.

The proof of service declares that notice of the hearing and the moving papers were served by electronically transmitting these documents to Case Anywhere on May 17, 2022. The plaintiff failed to attach a service list indicating which parties are receiving documents from Case Anywhere concerning this case. This needs to be clarified.

There is no opposition to the motion in the court's file.

"A cause of action that survives the death of the person entitled to commence an action or proceeding passes to the decedent's successor in interest, subject to Chapter 1 (commencing with Section 7000) of Part 1 of Division 7 of the Probate Code, and an action may be commenced by the decedent's personal representative or, if none, by the decedent's successor in interest." (Code of Civil Procedure, § 377.30.)

"For the purposes of this chapter, "decedent's successor in interest" means the beneficiary of the decedent's estate or other successor in interest who succeeds to a cause of action or to a particular item of the property that is the subject of a cause of action." (Code of Civil Procedure, § 377.11.)

"For the purposes of this chapter, "beneficiary of the decedent's estate" means: ¶ (a) If the decedent died leaving a will, the sole beneficiary or all of the beneficiaries who succeed to a cause of action, or to a particular item of property that is the subject of a cause of action, under the decedent's will. ¶ (b) If the decedent died without leaving a will, the sole person or all of the

persons who succeed to a cause of action, or to a particular item of property that is the subject of a cause of action, under Sections 6401 and 6402 of the Probate Code or, if the law of a sister state or foreign nation governs succession to the cause of action or particular item of property, under the law of the sister state or foreign nation." (Code of Civil Procedure, § 377.10.)

"On motion after the death of a person who commenced an action or proceeding, the court shall allow a pending action or proceeding that does not abate to be continued by the decedent's personal representative or, if none, by the decedent's successor in interest." (Probate Code, § 377.31.)

Plaintiff Daniels declares: he is successor in interest to his deceased spouse who passed away on May 2, 2022; a certified copy of her death certificate is attached as Exhibit A; no proceeding is pending for administration of Ms. Patrice's estate; he is the successor trustee of the subject trust and executor of Ms. Patrice's will; the real property that is the subject of this litigation is identified as an asset of the Trust under the schedules of trust assets; and since he is already a party to the action, out of an abundance of caution, he is advised to clarify the parties and pleadings and seek substitution for his late spouse.

Under the circumstances presented, it appears that the Trust is the successor in interest to plaintiff Patrice's claims in the instant action, plaintiff Daniels is an initial trustee who continues to serve as a co-trustee of the Trust, and the court is inclined to grant the motion.

However, the issue of the proof of service not listing the persons/parties who were served by means of electronic transmission to Case Anywhere needs to resolved first.

TENTATIVE RULING # 3: APPEARANCES ARE REQUIRED AT 8:30 A.M. ON FRIDAY, JUNE 24, 2022, IN DEPARTMENT NINE. IF A PARTY OR PARTIES WISH TO APPEAR TELEPHONICALLY THEY MUST APPEAR BY "VCOURT", WHICH MUST BE SCHEDULED

AND PAID THROUGH THE COURT WEBSITE AT www.eldorado.courts.ca.gov/online-services/telephonic-appearances.

4. MUIR v. GENERAL MOTORS PC-20210130

Plaintiff's Motion to Compel Deposition of Defendant's Most Qualified Person.

On March 18, 2021, plaintiffs filed an action against defendant asserting causes of action for Violation of the Song-Beverly Act – Breach of Express Warranty; Violation of the Song-Beverly Act – Breach of Implied Warranty; and Violation of the Song-Beverly Act – Section 1793.2.

Plaintiff moves to compel the deposition of defendant General Motors, LLC's most knowledgeable person and production of the documents requested in the notice of deposition.

Plaintiff argues: the court should not allow defendant to obstruct plaintiffs' right to depose defendant's most qualified person; the scope of discovery is broad; plaintiffs seek testimony and documents directly related to their claims under the Song-Beverly Consumer Warranty Act; and prevailing legal authority supports plaintiffs' discovery efforts.

Defendant General Motors, LLC opposes the motion on the following grounds: the motion should be denied, because plaintiffs did not satisfactorily meet and confer as plaintiffs did not address defendant's objections or the contested categories informally before filing the motion to compel; the motion should be denied as plaintiffs seek to compel irrelevant testimony and information; plaintiffs' request seeks production of trade secret material; and the motion should be denied, because plaintiffs failed to file a Rule 3.1345 separate statement with the motion.

Plaintiff filed a reply on May 9, 2022.

"The service of a deposition notice under Section 2025.240 is effective to require any deponent who is a party to the action or an officer, director, managing agent, or employee of a party to attend and to testify, as well as to produce any document or tangible thing for inspection and copying." (Code of Civil Procedure, § 2025.280(a))

If a party deponent fails to appear at a properly noticed deposition or fails to produce for inspection any document or tangible thing described in the deposition notice, then the party giving notice may move for an order compelling the deponent's attendance and testimony. (Code of Civil Procedure, § 2025.450(a).) "A motion under subdivision (a) shall comply with both of the following: ¶ (1) The motion shall set forth specific facts showing good cause justifying the production for inspection of any document or tangible thing described in the deposition notice. ¶ (2) The motion shall be accompanied by a meet and confer declaration under Section 2016.040, or, when the deponent fails to attend the deposition and produce the documents or things described in the deposition notice, by a declaration stating that the petitioner has contacted the deponent to inquire about the nonappearance." (Code of Civil Procedure, § 2025.450(b).)

Meet and Confer Requirement

Meet and confer declarations are required for motions to compel deponent's attendance and testimony and to produce the documents or things described in the deposition notice. (See Code of Civil Procedure, §§ 2025.450(a), 2025.450(b),)

"'The Discovery Act requires that, prior to the initiation of a motion to compel, the moving party declare that he or she has made a serious attempt to obtain "an informal resolution of each issue." (§ 2025, subd. (o)....) This rule is designed "to encourage the parties to work out their differences informally so as to avoid the necessity for a formal order...." (*McElhaney v. Cessna Aircraft Co.* (1982) 134 Cal.App.3d 285, 289, 184 Cal.Rptr. 547.) This, in turn, will lessen the burden on the court and reduce the unnecessary expenditure of resources by litigants through promotion of informal, extrajudicial resolution of discovery disputes. [Citations.]' (*Townsend v. Superior Court* (1998) 61 Cal.App.4th 1431, 1435, 72 Cal.Rptr.2d 333.)" (Stewart v. Colonial Western Agency, Inc. (2001) 87 Cal.App.4th 1006, 1016.) "A

determination of whether an attempt at informal resolution is adequate also involves the exercise of discretion. The level of effort at informal resolution which satisfies the 'reasonable and good faith attempt' standard depends upon the circumstances. In a larger, more complex discovery context, a greater effort at informal resolution may be warranted. In a simpler, or more narrowly focused case, a more modest effort may suffice. The history of the litigation, the nature of the interaction between counsel, the nature of the issues, the type and scope of discovery requested, the prospects for success and other similar factors can be relevant. Judges have broad powers and responsibilities to determine what measures and procedures are appropriate in varying circumstances. (See, e.g., Gov.Code, § 68607 [judge has responsibility to manage litigation]; Code Civ. Proc., § 128, subd. (a)(5) [judge has power to control conduct of judicial proceeding in furtherance of justice].) Judges also have broad discretion in controlling the course of discovery and in making the various decisions necessitated by discovery proceedings. (Citations omitted.)" (Obregon v. Superior Court (1998) 67 Cal.App.4th 424, 431.) "Although some effort is required in all instances (see, e.g., *Townsend*, supra, 61 Cal.App.4th at p. 1438, 72 Cal.Rptr.2d 333 [no exception based on speculation that prospects for informal resolution may be bleak]), the level of effort that is reasonable is different in different circumstances, and may vary with the prospects for success. These are considerations entrusted to the trial court's discretion and judgment, with due regard for all relevant circumstances." (Obregon, supra at pages 432-433.)

"A single letter, followed by a response which refuses concessions, might in some instances be an adequate attempt at informal resolution, especially when a legitimate discovery objective is demonstrated. The time available before the motion filing deadline, and the extent to which the responding party was complicit in the lapse of available time, can also be relevant. An evaluation of whether, from the perspective of a reasonable person in the position of the

discovering party, additional effort appeared likely to bear fruit, should also be considered. Although some effort is required in all instances (see, e.g., *Townsend, supra,* 61 Cal.App.4th at p. 1438, 72 Cal.Rptr.2d 333 [no exception based on speculation that prospects for informal resolution may be bleak]), the level of effort that is reasonable is different in different circumstances, and may vary with the prospects for success. These are considerations entrusted to the trial court's discretion and judgment, with due regard for all relevant circumstances. In the instant case, whether reviewed according to the substantial evidence or the abuse of discretion standard, or an amalgam of the two, the trial judge's decision that a greater effort at informal resolution should have been made is amply supported by this record. The petition for a writ of mandate is therefore denied to this extent." (Obregon v. Superior Court (1998) 67 Cal.App.4th 424, 432–433.)

Having read and considered the declarations submitted in support of and opposition to the motion and the plaintiffs' February 22, 2022, meet and confer letter attached as Exhibit 11 to plaintiff's counsel's declaration in support of the motion, the court finds that the attempt at informal resolution was adequate under the circumstances presented.

Separate Statement Requirement

Defendant's objections to the subject deposition served by email to plaintiffs' counsel on February 4, 2022, objected on numerous grounds to requests for production numbers 1-18, which are all categories of production requested in the notice of deposition. (See Declaration of Gregory Sogoyan in Support of Motion to Compel Deposition of Person Most Qualified, Exhibit 8 – Plaintiffs' Notice of Deposition of Person Most Knowledgeable, Exhibit A – Requests for Production, page 8, line 1 to page 10, line 15; and Exhibit 9 – Defendant's Objection to Plaintiffs' Notice of Deposition of Person Most Knowledgeable, page 21, line 16 to page 31, line 18.)

"Any motion involving the content of a discovery request or the responses to such a request shall be accompanied by a separate statement. The motions that require a separate statement include: ¶ * * * (5) a motion to compel or to quash the production of documents or tangible things at a deposition…" (Rules of Court, Rule 3.1345(a).)

"A separate statement is a separate document filed and served with the discovery motion that sets forth all the information necessary to understand each discovery request and all the responses to it that are at issue. The separate statement shall be full and complete so that no person is required to review any other document in order to determine the full request and the full response. Material shall not be incorporated into the separate statement by reference. The separate statement shall include--for each discovery request (e.g., each interrogatory, request for admission, deposition question, or inspection demand) to which a further response, answer, or production is requested--the following: ¶ (1) the text of the request, interrogatory, question, or inspection demand; ¶ (2) the text of each response, answer, or objection, and any further responses or answers; ¶ (3) a statement of the factual and legal reasons for compelling further responses, answers, or production as to each matter in dispute; ¶ (4) if necessary, the text of all definitions, instructions, and other matters required to understand each discovery request and the responses to it; ¶ (5) if the response to a particular discovery request is dependent on the response given to another discovery request, or if the reasons a further response to a particular discovery request is deemed necessary are based on the response to some other discovery request, the other request and the response to it must be set forth; and ¶ (6) if the pleadings, other documents in the file, or other items of discovery are relevant to the motion, the party relying on them shall summarize each relevant document." (Rules of Court, Rule 3.1345 (c).)

The motion is defective in that plaintiff has failed to file and serve a separate document which sets forth each request for production in the notice of deposition to which production is requested, the response given, and the factual and legal reasons for compelling it. (California Rules of Court, Rule 3.1345(c).) Such a statement is critical to the court's analysis of each request for production and the sufficiency of each response, particularly where there are numerous requests for production to which production are sought. Although Rule 3.1345 does not explicitly provide a remedy for failure to comply with it, at least one appellate court has cited with approval the trial court's dropping of a motion to compel discovery where the moving part failed to comply with Rule 335, which was renumbered as Rule 3.1345. (See BP Alaska Exploration, Inc. v. Superior Court (1988) 199 Cal.App.3d 1240, 1270 and Neary v. Regents of University of California (1986) 185 Cal.App.3d 1136, 1145.) A trial court is acting well within its discretion to deny a motion to compel discovery on the basis that the mandated separate statement was not provided or the statement provided does not comply with the requirements of the Court Rule. (Mills v. U.S. Bank (2008) 166 Cal.App.4th 871, 893.)

Plaintiffs' reply filed on May 9, 2022, wherein they apologized for failure to provide a separate statement and asserted that the moving papers contained the reasoning behind each of the requests for examination and documents. Plaintiffs also stated that they were willing to provide a separate statement within a short period of time upon instruction by the court.

Rather than deny the motion outright at the hearing on May 13, 2022, the court continued the hearing to June 24, 2022, and directed the following: Plaintiffs are to file and serve the separate statement by May 25, 2022. Defendant's response to the separate statement and a memorandum of points and authorities limited to addressing the legal points raised in the plaintiffs' separate statement shall be filed and served by June 13, 2022. The reply is to be filed and served by June 17, 2022.

On May 23, 2022, defendant filed a declaration in opposition to the motion and another opposition to the motion.

There was no separate statement in support of the motion in the court's file as of the date this ruling was prepared.

TENTATIVE RULING # 4: PLAINTIFF'S MOTION TO COMPEL DEPOSITION OF DEFENDANT'S MOST QUALIFIED PERSON IS DENIED WITHOUT PREJUDICE. NO HEARING ON THIS MATTER WILL BE HELD (LEWIS V. SUPERIOR COURT (1999) 19 CAL.4TH 1232, 1247.), UNLESS A NOTICE OF INTENT TO APPEAR AND REQUEST FOR ORAL ARGUMENT IS TRANSMITTED ELECTRONICALLY THROUGH THE COURT'S WEBSITE OR BY TELEPHONE TO THE COURT AT (530) 621-6551 BY 4:00 P.M. ON THE DAY THE TENTATIVE RULING IS ISSUED. NOTICE TO ALL PARTIES OF AN INTENT TO APPEAR MUST BE MADE BY TELEPHONE OR IN PERSON. PROOF OF SERVICE OF SAID NOTICE MUST BE FILED PRIOR TO OR AT THE HEARING. LONG CAUSE HEARINGS MUST BE REQUESTED BY 4:00 P.M. ON THE DAY THE TENTATIVE RULING IS ISSUED AND THE PARTIES ARE TO PROVIDE THE COURT WITH THREE MUTUALLY AGREEABLE DATES ON FRIDAY AFTERNOONS AT 2:30 P.M. LONG CAUSE ORAL ARGUMENT REQUESTS WILL BE SET FOR HEARING ON ONE OF THE THREE MUTUALLY AGREEABLE DATES ON FRIDAY AFTERNOONS AT 2:30 P.M. THE COURT WILL ADVISE THE PARTIES OF THE LONG CAUSE HEARING DATE AND TIME BY 5:00 P.M. ON THE DAY THE TENTATIVE RULING IS ISSUED. PARTIES MAY PERSONALLY APPEAR AT THE HEARING. IF A PARTY OR PARTIES WISH TO APPEAR TELEPHONICALLY THEY MUST APPEAR BY "VCOURT", WHICH MUST BE SCHEDULED AND PAID THROUGH THE COURT WEBSITE AT www.eldorado.courts.ca.gov/online-services/telephonic-appearances. MATTERS IN WHICH THE PARTIES' TOTAL TIME

ESTIMATE FOR ARGUMENT IS 15 MINUTES OR LESS WILL BE HEARD ON THE LAW AND MOTION CALENDAR AT 8:30 A.M. ON FRIDAY, JUNE 24, 2022, EITHER IN PERSON OR BY VCOURT TELEPHONIC APPEARANCE UNLESS OTHERWISE NOTIFIED BY THE COURT.

5. ALL ABOUT EQUINE ANIMAL RESCUE v. BYRD PC-20200294

Defendants' Motion to Compel Compliance with Court Order.

On August 31, 2021, plaintiff Georgetown Divide Recreation District (Georgetown) filed a 1st Amended Complaint asserting causes of action for quiet title, declaratory relief, trespass to land, trespass to chattel, and nuisance. On September 3, 2021, the court denied defendants' motion to expunge lis pendens. On September 30, 2021, defendants filed demurrers to the 1st and 2nd causes of action for quiet title and declaratory relief of the 1st amended complaint concerning the subject easement. The 1st amended demurrer to the 1st amended complaint was filed by defendants Byrd, Rodarte, Wilson, and Saunders on October 13, 2021.

On February 18, 2022, the court overruled the demurrers.

Defendants Byrd, Rodarte, and Wilson move to compel compliance with the court's ruling on demurrer on the following grounds: the ruling is a court order that clearly established that plaintiff Georgetown Divide Recreation District was obligated under the 1977 grant deed to approve a map that established the exact location of the easement upon approval of the El Dorado County Board of Supervisors of a land division map submitted by either A&B Development Company or its successors or assigns which map covers the above-described area with such easement delineated; plaintiff Georgetown refuses to approve the maps to establish the exact location and dimensions of the easement that were submitted to it by defense counsel; and plaintiff Georgetown's Board of Supervisors has a meeting scheduled on March 28, 2022 where they will be asked to again approve a map, which defendants are informed and believe will be refused.

Defendants move for the following orders to be issued: plaintiff Georgetown be compelled to approve defendants' map establishing the exact location of the easement; that the court

approve the parcel map and/or record of survey and location of the easement; the court order that plaintiff Georgetown has waived the covenants in the grant deeds and their obligations as set forth in the courts order on demurrer, or, order that plaintiff Georgetown's refusal to approve defendants' map is ratification of the parcel map and easement set forth therein; and compel plaintiff Georgetown to deed their property back to the County of El Dorado for the amount which they paid for the property so that the County of El Dorado can fulfill the obligations under the grant deed.

Plaintiff Georgetown opposes the motion on the following grounds: this a frivolous motion brought in bad faith that is not premised upon a court order that requires or directs the plaintiff to take any action; defendants can not just skip over a trial and be granted summary judgment without filing a proper summary judgment motion; and overruling the defendants' demurrers is not an order compelling plaintiff to approve or consider a map.

At the time this ruling was prepared there was no reply in the court's file.

Plaintiff Georgetown's Objections to Defendant's Evidence Submitted in Support of the Motion

Objection numbers 1-8 are sustained.

Compelling Obedience to Court Orders

"(a) Every court shall have the power to do all of the following: ¶ * * * (4) To compel obedience to its judgments, orders, and process, and to the orders of a judge out of court, in an action or proceeding pending therein…" (Code of Civil Procedure, § 128(a)(4).)

The court takes judicial notice of the fact that on April 18, 2022, after oral argument the court overruled defendants Byrd's, Rodarte's, Wilson's, and Saunders' demurrers to the 1st and 2nd causes of action of the 1st Amended Complaint in consolidated case Georgetown Divide v. Byrd (PC-20210234).

Overruling demurrers to a pleading is not and can never be an enforceable final court order determining the dispute related to the Highway 49 easement. When the court overrules a demurrer the court has decided that the allegations of fact in the pleading when taken as true for the purposes of the demurrers are sufficient to state causes of action.

"A demurrer challenges only the legal sufficiency of the complaint, not the truth of its factual allegations or the plaintiff's ability to prove those allegations. (*Amarel v. Connell* (1988) 202 Cal.App.3d 137, 140 [248 Cal.Rptr. 276].) We therefore treat as true all the complaint's material factual allegations, but not contentions, deductions or conclusions of fact or law. (*Id*. at p. 141; *Blank v. Kirwan* (1985) 39 Cal.3d 311, 318 [216 Cal.Rptr. 718, 703 P.2d 58].) We can also consider the facts appearing in exhibits attached to the complaint. (See *Dodd v. Citizens Bank of Costa Mesa*, supra, 222 Cal.App.3d at p. 1627.) We are required to construe the complaint liberally to determine whether a cause of action has been stated, given the assumed truth of the facts pleaded. (*Rogoff v. Grabowski* (1988) 200 Cal.App.3d 624, 628 [246 Cal.Rptr. 185].)" (Emphasis added.) (Picton v. Anderson Union High School Dist. (1996) 50 Cal.App.4th 726, 732-733.)

A demurrer is not a procedural device for a party to obtain a final adjudication of the existence, rights and obligations related to a dispute over a claimed easement. Defendants/Cross-Defendants did not file a motion for summary judgment or summary adjudication of causes of action or obtain a final judgment in their favor on the easement claim.

The cross-defendants' assertion that a ruling that their demurrers are overruled is an enforceable final court order determining the dispute related to the Highway 49 easement is entirely and completely without merit.

Defendants' Motion to Compel Compliance with Court Order is denied.

TENTATIVE RULING # 5: DEFENDANTS' MOTION TO COMPEL COMPLIANCE WITH COURT ORDER IS DENIED. NO HEARING ON THIS MATTER WILL BE HELD (LEWIS V. SUPERIOR COURT (1999) 19 CAL.4TH 1232, 1247.), UNLESS A NOTICE OF INTENT TO APPEAR AND REQUEST FOR ORAL ARGUMENT IS TRANSMITTED ELECTRONICALLY THROUGH THE COURT'S WEBSITE OR BY TELEPHONE TO THE COURT AT (530) 621-6551 BY 4:00 P.M. ON THE DAY THE TENTATIVE RULING IS ISSUED. NOTICE TO ALL PARTIES OF AN INTENT TO APPEAR MUST BE MADE BY TELEPHONE OR IN PERSON. PROOF OF SERVICE OF SAID NOTICE MUST BE FILED PRIOR TO OR AT THE HEARING. LONG CAUSE HEARINGS MUST BE REQUESTED BY 4:00 P.M. ON THE DAY THE TENTATIVE RULING IS ISSUED AND THE PARTIES ARE TO PROVIDE THE COURT WITH THREE MUTUALLY AGREEABLE DATES ON FRIDAY AFTERNOONS AT 2:30 P.M. LONG CAUSE ORAL ARGUMENT REQUESTS WILL BE SET FOR HEARING ON ONE OF THE THREE MUTUALLY AGREEABLE DATES ON FRIDAY AFTERNOONS AT 2:30 P.M. THE COURT WILL ADVISE THE PARTIES OF THE LONG CAUSE HEARING DATE AND TIME BY 5:00 P.M. ON THE DAY THE TENTATIVE RULING IS ISSUED. PARTIES MAY PERSONALLY APPEAR AT THE HEARING. IF A PARTY OR PARTIES WISH TO APPEAR TELEPHONICALLY THEY MUST APPEAR BY "VCOURT", WHICH MUST BE SCHEDULED AND PAID THROUGH THE COURT WEBSITE AT www.eldorado.courts.ca.gov/online-services/telephonic-appearances. MATTERS IN WHICH THE PARTIES' TOTAL TIME ESTIMATE FOR ARGUMENT IS 15 MINUTES OR LESS WILL BE HEARD ON THE LAW AND MOTION CALENDAR AT 8:30 A.M. ON FRIDAY, JUNE 24, 2022, EITHER IN PERSON OR BY VCOURT TELEPHONIC APPEARANCE UNLESS OTHERWISE NOTIFIED BY THE COURT.

6. SA v. EL DORADO IRRIGATION DISTRICT PC-20200137

Defendants' Motion for Summary Judgment.

TENTATIVE RULING # 6: THIS MATTER IS CONTINUED TO 8:30 A.M. ON FRIDAY, JULY 29, 2022, IN DEPARTMENT NINE.

7. AUSTIN v. EL DORADO COUNTY PC-20150633

(1) Defendant's Motion to Dismiss Claims Regarding TIM Fees Zones 1-7 and 8 for Failure to Join Indispensable Parties.

(2) Defendant's Motion to Bifurcate Briefing.

Defendant's Motion to Dismiss Action for Failure to Join Indispensable Parties.

Defendants County of El Dorado and County of El Dorado Community Development Agency, Development Services Division (County) move to dismiss plaintiffs' claims for reimbursement of funds held in Traffic Impact Mitigation Fee Zones 1-7 and 8 on the following grounds: indispensable party developers West Valley, LLC, Silver Springs, LLC, and Lennar Winncrest, LLC though named as parties to the litigation, have not appeared due to plaintiffs' allowing those defendants an open-ended, wrongful extension of time to respond; developer Sunset Tartesso, LLC who entered into a development agreement with the County in 2019, after the 2nd amended complaint was filed is an indispensable party that has not been added to this case; the proofs of service on indispensable party developers West Valley, LLC and Silver Springs, LLC were not filed until more than four years after they were served in violation of Code of Civil Procedure, § 583.210; although indispensable party developer Lennar Winncrest, LLC has been named in the 2nd amended complaint, that indispensable party is not properly a party to this action due to plaintiffs' improper extension of time for that party to respond, the expiration of the statute of limitations prior to adding it as a defendant, and defects in service of a request to enter default against Lennar Winncrest, LLC, therefore the court must dismiss the claim related to TIM Fees Zones 1-7 and 8; even though the County entered into a developer contract with Sunset Tartesso, LLC after the 2nd amended complaint was filed, it is an indispensable party related to TIM Fees Zone 8 who is not named in this action and the action

can not be maintained against this unnamed indispensable party, because if added to the action Sunset Tartesso, LLC could not be served within three years of the filing of the complaint and the action asserted against Sunset Tartesso, LLC would be subject to mandatory dismissal pursuant to the provisions of Code of Civil Procedure, § 583.250.

Plaintiffs oppose the motion on the following grounds: Sunset Tartesso, LLC, Lennar Winncrest, LLC, West Valley, LLC and Silver Springs, LLC are not indispensable parties, because the projected collections of funds for the subject TIM Zones exceeds the amounts plaintiffs claim as refunds plus the amounts these developer defendants will claim from the TIM funds under the respective contracts with the County; even if the four parties are indispensable parties, the court may in equity and good conscience exercise its discretion to allow the action to proceed; the county's argument regarding the statute of limitations lacks merit, because the County does not have standing to assert that affirmative defense on behalf of these four parties; there are no facts, law or evidence before the court that establishes that each of these four other parties have the same one-year statute of limitations as the local agency defendant; the court has the discretion to apply the relation back doctrine even though the indispensable parties were not substituted for DOE defendants; Sunset Tartesso, LLC is not an indispensable party, because it did not enter its agreement with the County until 2019, long after this action was filed, and the subject agreement contained a clause which informed it of the pending litigation challenging the TIM Fee program and making payment strictly contingent of availability of funds from the uncommitted TIM fund; for the same reason, defendant Lennar Winncrest, LLC can not be an indispensable party, because it entered into its agreement with the County in 2020; and the three year limitation to serve a defendant does not apply to Sunset Tartesso, LLC under the circumstances presented.

At the time this ruling was prepared there was no reply in the court's file.

Plaintiff's Objections to Declaration of Laura Swartz in Opposition to Motion

Objection numbers 1-4 are overruled.

Statute of Limitations

Defendant County argues that while West Valley, LLC, Silver Springs, LLC, and Lennar Winncrest, LLC are necessary parties named in the second amended complaint filed on January 2, 2018, they were not named as DOE defendants, the 2nd amended complaint did not relate back, and the action against them is barred by the one-year statute of limitation that expired on November 15, 2017. Therefore, they can not be parties in this action and as they are indispensable parties and the action as it relates to TIM Fees Zones 1-7 and 8 must be dismissed from the action.

Plaintiffs argue in opposition that defendant County has no standing to assert the statute of limitation affirmative defense on behalf of other defendants.

""[T]he statute of limitations is a personal privilege which is waived unless asserted at the proper time and in the proper manner, whether it be a general statute of limitations or one relating to a special proceeding." (*Bohn v. Watson*, *supra*, 130 Cal.App.2d at p. 36, 278 P.2d 454.)" (Emphasis added.) (Chaplin v. State Personnel Board (2020) 54 Cal.App.5th 1104, 1118.)

A defendant has no right to assert an affirmative defense of the statute of limitation on behalf of co-defendants that they could conceivably raise in response to a 2nd amended complaint, because only those co-defendants have standing to raise such defenses.

Therefore, the statute of limitations defense of other co-defendants is not an appropriate ground upon which defendant County can obtain a dismissal of the action for purported failure to timely file an amendment adding co-defendants to the case.

The court need not and does not make any determination as to whether the action against any of the developer defendants are barred by the applicable statute of limitations.

Open-Ended Extension of Time to Respond to 2nd Amended Complaint

Defendant County argues that plaintiffs' violation of Local Rule 7.12.07A. by providing developer defendants West Valley, LLC, Silver Springs, LLC, and Lennar Winncrest, LLC an open-ended extension to respond amounting to four years after they were served is grounds to dismiss the claims for refund of TIM Fees for Zones 1-7 and 8.

"TIMING OF RESPONSIVE PLEADINGS. The parties shall file and serve responsive pleadings within the time permitted by law; provided, however, that the parties may stipulate without leave of court to one 15-day extension of the time for filing responsive pleadings." (Local Rule 7.12.07A.)

The court notes that it has long been held that noncompliance with court rules, to which no penalty was attached, does not prevent the court from hearing and disposing of motions. (See Johnson v. Sun Realty Co. (1934) 138 Cal.App. 296, 299.)

"Local court policies are generally enforceable as court rules, which have the effect of procedural statutes so long as they are not contrary to higher law. (*Wisniewski v. Clary* (1975) 46 Cal.App.3d 499, 504-505, 120 Cal.Rptr. 176.) A court may, however, suspend its own rules or except a particular case from their operation whenever the purposes of justice so require. (*Adams v. Sharp* (1964) 61 Cal.2d 775, 777, 40 Cal.Rptr. 255, 394 P.2d 943.)" (Estate of Cattalini (1979) 97 Cal.App.3d 366, 371.)

Local Rule 7.12.07A. does not mandate the court to dismiss an action against a defendant where the plaintiff has granted lengthy extensions of time to respond to a complaint beyond 15 days after the time the response is due by statute.

The court exercises its discretion to refuse to dismiss this case merely because indispensable parties who are still parties to the action have not responded to the operative pleading due to a lengthy extension to respond being granted by the plaintiffs.

60 Day Period to File Proof of Service

Defendant County argues that failure to file proofs of service on developer defendants within 60 days after service of the 2nd amended complaint on them mandates dismissal of the claims for refund of the funds held for TIM Fees Zones 1-7 and 8.

"The summons and complaint shall be served upon a defendant within three years after the action is commenced against the defendant. For the purpose of this subdivision, an action is commenced at the time the complaint is filed." (Emphasis added.) (Code of Civil Procedure, § 583.210(a).)

"Proof of service of the summons shall be filed within 60 days after the time the summons and complaint must be served upon a defendant." (Code of Civil Procedure, § 583.210(b).)

"As used in this chapter, unless the provision or context otherwise requires: ¶ * * * (f) "Service" includes return of summons." (Code of Civil Procedure, § 583.110(f).)

"If service is not made in an action within the time prescribed in this article: ¶ (1) The action shall not be further prosecuted and no further proceedings shall be held in the action. ¶ (2) The action shall be dismissed by the court on its own motion or on motion of any person interested in the action, whether named as a party or not, after notice to the parties." (Emphasis added.) (Code of Civil Procedure, § 583.250(a).)

The court is not statutorily mandated to dismiss an action where the proof of service is belatedly filed. (Emphasis the court's.)

Purported Improper Request to Enter Default

Defendant County asserts that Lennar Winncrest, LLC entered into a credit and reimbursement agreement to construct a road realignment in January 2020, which made it an indispensable party regarding its claims against the funds held for TIM Fees Zone 1-7 and 8. (See Memorandum of Posits and Authorities in Support of Motion page 15, line 27 to page 16, line 17.) Defendant County also asserts that the request to enter default is fatally defective, because it was mailed to the wrong address for Lennar Winncrest, LLC, therefore, the claims must be dismissed as the court can not enter a default judgment against Lennar Winncrest, LLC.

Assuming for the sake of argument only that the service of the request for entry of default was not mailed to the proper address, the plaintiffs are not barred from remedying any defect in service and then obtain entry of default against defendant Lennar Winncrest, LLC.

The court rejects the argument that a purported ineffective service of a request to enter default against a single defendant mandates dismissal of the action seeking refund of funds held in the TIM Fees Zones 1-7 and 8 accounts.

Three Year Limitation to Serve Defendants

Defendant County asserts that developer Sunset Tartesso, LLC is an indispensable party and could never be added to this case, because it can not be served within three years of the filing of this action.

"The summons and complaint shall be served upon a defendant within three years after the action is commenced against the defendant. For the purpose of this subdivision, an action is commenced at the time the complaint is filed." (Code of Civil Procedure, § 583.210(a).)

"If service is not made in an action within the time prescribed in this article: ¶ (1) The action shall not be further prosecuted and no further proceedings shall be held in the action. ¶ (2) The

action shall be dismissed by the court on its own motion or on motion of any person interested in the action, whether named as a party or not, after notice to the parties." (Code of Civil Procedure, § 583.250(a).)

"The requirements of this article are mandatory and are not subject to extension, excuse, or exception except as expressly provided by statute." (Code of Civil Procedure, § 583.250(b).)

Section 583.210 applies to fictitiously named defendants and the three-year limitation commences to run on the date of filing of the original complaint. (Gray v. Firthe (1987) 194 Cal.App.3d 202, 209.) However, where the defendants are not designated as fictitiously named defendants by amendment, an amended complaint is filed naming these new defendants, and the original complaint did not state a cause of action against these defendants even if they were designated as fictitiously named defendants, then the three year limitation to serve those defendants commences with the filing of the amended complaint wherein they are first named in the action and which sufficiently states a cause of action against them. (See Gray v. Firthe (1987) 194 Cal.App.3d 202, 209-210.)

Sunset Tartesso, LLC is not named in the operative 2nd amended complaint, the amended complaint, or the initial complaint, therefore, the three-year limitation to serve Sunset Tartesso, LLC has not commenced to run and serves no basis for the court to dismiss the claim regarding TIM Fees Zone 8 funds.

Whether Sunset Tartesso, LLC is an Indispensable Party

"A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect

that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest. If he has not been so joined, the court shall order that he be made a party." (Code of Civil Procedure, § 389(a).)

"If a person as described in paragraph (1) or (2) of subdivision (a) cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed without prejudice, the absent person being thus regarded as indispensable. The factors to be considered by the court include: (1) to what extent a judgment rendered in the person's absence might be prejudicial to him or those already parties; (2) the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; (3) whether a judgment rendered in the person's absence will be adequate; (4) whether the plaintiff or cross-complainant will have an adequate remedy if the action is dismissed for nonjoinder." (Code of Civil Procedure, § 389(b).)

"…"[a] person is an indispensable party [only] when the judgment to be rendered necessarily must affect his rights." *Hartman Ranch Co. v. Associated Oil Co.* (1937) 10 Cal.2d 232, 262, 73 P.2d 1163.)" (Olszewski v. Scripps Health (2003) 30 Cal.4th 798, 808-809.) and in determining if a party is an indispensible party due to the inability to provide complete relief in the action, the focus is on whether complete relief can be afforded the parties named in the action. (Deltakeeper v. Oakdale Irrigation Dist. (2001) 94 Cal.App.4th 1092, 1101.)

The Third District Court of Appeal has stated: "The first clause, the "complete relief" clause, focuses not on whether complete relief can be afforded all possible parties to the action, but on whether complete relief can be afforded the parties named in the action. (*Countrywide Home*

Loans, Inc. v. Superior Court, supra, 69 Cal.App.4th at pp. 793-794, 82 Cal.Rptr.2d 63.)" (Deltakeeper v. Oakdale Irrigation Dist. (2001) 94 Cal.App.4th 1092, 1101.)

The Third District also stated: "Under subdivision (b) of section 389 we must determine whether a necessary party to the action is indispensable. ¶ A party is indispensable only in the "conclusory sense that in [its] absence, the court has decided the action should be dismissed. Where the decision is to proceed the court has the power to make a legally binding adjudication between the parties properly before it." (Cal. Law Revision Com. com., 14 West's Ann.Code Civ. Proc. (1973 ed.) foll. § 389, p. 222.) The Supreme Court has warned that courts must " 'be careful to avoid converting [section 389 from] a discretionary power or a rule of fairness ... into an arbitrary and burdensome requirement which may thwart rather than accomplish justice.' [Citation.]" (*Countrywide Home Loans, Inc. v. Superior Court*, supra, 69 Cal.App.4th at p. 793, 82 Cal.Rptr.2d 63, quoting *Bank of California v. Superior Court* (1940) 16 Cal.2d 516, 521, 106 P.2d 879.)" (Deltakeeper v. Oakdale Irrigation Dist. (2001) 94 Cal.App.4th 1092, 1105.)

The Supreme Court has stated with regards to indispensable parties: "Thus, "[a] person is an indispensable party [only] when the judgment to be rendered necessarily must affect his rights." *Hartman Ranch Co. v. Associated Oil Co.* (1937) 10 Cal.2d 232, 262, 73 P.2d 1163.)" (Olszewski v. Scripps Health (2003) 30 Cal.4th 798, 808-809.)

On November 15, 2016, the County Board adopted five-year findings for the TIM fee accounts that are the subject of this action. (Defendant's Request for Judicial Notice, Exhibit 11 – County Board Resolution 186-2016.)

Assuming for the sake of argument only those plaintiffs prevail in this action on its merits, the one-year limitation only allows plaintiffs to recover the fees collected from December 20, 2014, one year prior to the filing of this action, to November 15, 2016, when the County made

the appropriate five-year analysis (See County of El Dorado v. Superior Court (2019) 42 Cal.App.5th 620, 628.) Therefore, assuming for the sake of argument only that the plaintiffs prevail on the merits of this litigation, plaintiffs are not entitled to a judgment requiring refund of funds flowing into the TIM zone account after the five-year analysis was approved on November 16, 2016, to the present and not entitled to recover fees deposited prior to December 20, 2014, that remain on deposit.

Sunset Tartesso, LLC contracted with the County in 2019 and will be paid from the TIM funds for services after the date of the contract. Defendant's request for judicial notice Exhibit 13 and plaintiffs request for judicial notice Exhibits A and C establish that sufficient funds remain available to reimburse/pay Sunset Tartesso, LLC pursuant to the contract from the TIM fees remaining on deposit and reasonably projected to be collected during the time of the contract even if the fees claimed in this action are ordered to be refunded. In other words, Sunset Tartesso, LLC does not appear to be an indispensable party, because the judgment to be rendered does not necessarily affect its rights.

The motion to dismiss is denied.

Defendant County's Motion to Bifurcate Briefing.

The action will be determined by the parties' oral argument at a court trial that is estimated to take not more than one day, and that trial is set for November 10, 2022, with the opening brief due August 10, 2022, opposition brief due September 9, 2022, and reply due on October 10, 2022. (Court's May 9, 2022, Minute Order After Trial Setting Conference.)

Defendant County moves to bifurcate/trifurcate the briefs into three parts: the parties first briefs are to be directed only to defendant's/respondent's affirmative defenses (Part One); after the court decides what claims may remain after application of the affirmative defenses, the court then directs the parties to file briefs on the merits of the plaintiffs' claim of liability for

refund of the TIM fees (Part Two); and if the court determines after the trial on the merits of the liability claims that County is liable to refund fees collected, a third set if briefs will be filed addressing the issues of refund remedies and he County Board's discretion to determine how refunds are made under Government Code, § 66001(c) (Part Three). Defendant County argues that the court should order the bifurcation/trifurcation by exercising its discretion under Code of Civil Procedure, §§ 598 and 1048(b) to bifurcate/sever trials of issues for the following reasons: to avoid a waste of time in litigating the issue of whether defendant County is liable to reimburse funds held in the subject TIM fee accounts where the affirmative defenses, if determined in defendant County's favor, will dispose of the action without a trial on the issue of liability and refund damages; to further convenience or to avoid prejudice; and the separate briefings/trials will be conducive to expedition and economy.

Plaintiffs oppose the motion on the following grounds: there is no reason to disrupt the normal order of presentation of argument in the briefs; there is no legal support to for this manner of briefing; County wants to reargue the defense of Government Code, § 65010, which was already addressed in the appellate decision in this case (County of El Dorado v. Superior Court (2019) 42 Cal.App.5th 620, 628-629.) and to argue the defense of substantial compliance that was previously address in Walker v. San Clement (2105) 239 Cal.App. 4th 1350; there is no need for the additional briefing pages as plaintiffs have previously briefed these same issues and defenses in another matter in less than 50 pages and there is no need for 35 pages of opening and opposing briefs solely dedicated to defenses; and defendants have not demonstrated that good, solid grounds exist to bifurcate, therefore, the court should deny the motion. However, plaintiffs agree to separate briefing to address the application of the remedies sought in the event they prevail.

At the time this ruling was prepared there was no reply in the court's file.

When the convenience of witnesses, the ends of justice, or the economy and efficiency of handling the litigation would be promoted, the court, after notice and hearing, may make an order, no later than the close of pretrial conference in cases in which such pretrial conference is to be held, or, in other cases, no later than 30 days before the trial date, or on its own motion at any time, that the trial of any issue or any part thereof shall precede the trial of any other issue or any part thereof in the case, except for special defenses which may be tried first pursuant to Sections 597 and 597.5. (Code of Civil Procedure, § 598.) The principal reason for Section 598 providing for the trial of liability before the trial of damages is to avoid the waste of time and money caused by the unnecessary trial of damage questions in cases where the liability issue is resolved against the plaintiff. (Horton v. Jones (1972) 26 Cal.App.3d 952, 954-955.)

"(b) The court, in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy, may order a separate trial of any cause of action, including a cause of action asserted in a cross-complaint, or of any separate issue or of any number of causes of action or issues, preserving the right of trial by jury required by the Constitution or a statute of this state or of the United States." (Code of Civil Procedure, § 1048(b).)

"The trial court had ample authority to make this discretionary decision. Aside from the language in Code of Civil Procedure section 598, which concerns pretrial motions, Evidence Code section 320 provides that "[e]xcept as otherwise provided by law, the court in its discretion shall regulate the order of proof." Similarly, Code of Civil Procedure section 1048, subdivision (b) states that a trial court, "in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy, may order a separate trial of any cause of action ... or of any separate issue or of any number of causes of action or

issues...." Under these provisions, trial courts have broad discretion to determine the order of proof in the interests of judicial economy. (*Buran Equipment Co. v. H & C Investment Co.* (1983) 142 Cal.App.3d 338, 343-344, 190 Cal.Rptr. 878.)" (Grappo v. Coventry Financial Corp. (1991) 235 Cal.App.3d 496, 504.)

The proposed three-part briefing will only delay the proceedings of the trial in this action and result in 120 pages of briefings by defendant County and 135 pages of briefings by plaintiffs. What should be determined in one day by a single set of briefings and oral argument will be strung out into multiple days of trial and cause delay to allow time for the proposed two additional briefing cycles and then set aside two additional days for oral arguments.

A single set of briefs should be sufficient, and the projected one-day court trial will not unduly burden or prejudice the parties if the issues of liability, refund remedies, damages, and affirmative defenses are decided after oral argument during that one proceeding.

The motion is denied.

TENTATIVE RUING # 7: DEFENDANT'S MOTION TO DISMISS CLAIMS REGARDING TIM FEES ZONES 1-7 AND 8 FOR FAILURE TO JOIN INDISPENSABLE PARTIES IS DENIED. DEFENDANT COUNTY'S MOTION TO BIFURCATE BRIEFING IS DENIED. NO HEARING ON THESE MATTERS WILL BE HELD (LEWIS V. SUPERIOR COURT (1999) 19 CAL.4TH 1232, 1247.), UNLESS A NOTICE OF INTENT TO APPEAR AND REQUEST FOR ORAL ARGUMENT IS TRANSMITTED ELECTRONICALLY THROUGH THE COURT'S WEBSITE OR BY TELEPHONE TO THE COURT AT (530) 621-6551 BY 4:00 P.M. ON THE DAY THE TENTATIVE RULING IS ISSUED. NOTICE TO ALL PARTIES OF AN INTENT TO APPEAR MUST BE MADE BY TELEPHONE OR IN PERSON. PROOF OF SERVICE OF SAID NOTICE MUST BE FILED PRIOR TO OR AT THE HEARING. LONG CAUSE HEARINGS MUST BE REQUESTED BY 4:00 P.M. ON THE DAY THE TENTATIVE RULING IS ISSUED

AND THE PARTIES ARE TO PROVIDE THE COURT WITH THREE MUTUALLY AGREEABLE DATES ON FRIDAY AFTERNOONS AT 2:30 P.M. LONG CAUSE ORAL ARGUMENT REQUESTS WILL BE SET FOR HEARING ON ONE OF THE THREE MUTUALLY AGREEABLE DATES ON FRIDAY AFTERNOONS AT 2:30 P.M. THE COURT WILL ADVISE THE PARTIES OF THE LONG CAUSE HEARING DATE AND TIME BY 5:00 P.M. ON THE DAY THE TENTATIVE RULING IS ISSUED. PARTIES MAY PERSONALLY APPEAR AT THE HEARING. IF A PARTY OR PARTIES WISH TO APPEAR TELEPHONICALLY THEY MUST APPEAR BY "VCOURT", WHICH MUST BE SCHEDULED AND PAID THROUGH THE COURT WEBSITE AT www.eldorado.courts.ca.gov/online-services/telephonic-appearances. MATTERS IN WHICH THE PARTIES' TOTAL TIME ESTIMATE FOR ARGUMENT IS 15 MINUTES OR LESS WILL BE HEARD ON THE LAW AND MOTION CALENDAR AT 8:30 A.M. ON FRIDAY, JUNE 24, 2022, EITHER IN PERSON OR BY VCOURT TELEPHONIC APPEARANCE UNLESS OTHERWISE NOTIFIED BY THE COURT.

8. HIGH HILL RANCH, LLC v. COUNTY OF EL DORADO 21CV0178

Hearing Re: Receipt of Administrative Record.

Review Hearing Re: Receipt of Administrative Record.

High Hill Ranch appeals from the administrative decision in a code enforcement case. Plaintiff lodged the purported administrative record on May 26, 2022.

The matter was continued from June 10, 2022, to June 24, 2022, by agreement of the parties.

The court is unable to find any certification of the purported record by the County in the court's file.

TENTATIVE RUING # 8: APPEARANCES ARE REQUIRED AT 8:30 A.M. ON FRIDAY, JUNE 24, 2022, IN DEPARTMENT NINE. IF A PARTY OR PARTIES WISH TO APPEAR TELEPHONICALLY THEY MUST APPEAR BY "VCOURT", WHICH MUST BE SCHEDULED AND PAID THROUGH THE COURT WEBSITE AT www.eldorado.courts.ca.gov/online-services/telephonic-appearances.

9. LIGHT v. CAMERON PARK SENIOR LIVING, LLC 22CV0135

(1) Defendants Cameron Park Senior Living, LLC's, Sequoia Senior Living, LLC's, CPSL SPE, LLC's and Kasner's Demurrer to Complaint.

(2) Defendants Cameron Park Senior Living, LLC's, Sequoia Senior Living, LLC's, CPSL SPE, LLC's and Kasner's Motion to Strike Punitive Damages Prayers and the Allegations in Support Thereof.

Defendants Cameron Park Senior Living, LLC's, Sequoia Senior Living, LLC's, CPSL SPE, LLC's and Kasner's Demurrer to Complaint.

Plaintiffs filed an action against defendant's asserting causes of action for Elder Abuse by Neglect, Financial Elder Abuse, Negligence/Negligence Per Se, Violation of the Patient's Bill of Rights, Fraud/Misrepresentation/Omission, Unfair Business Practices, Wrongful Death, and Survival Action.

Defendants demurs to complaint on the following grounds: the elder abuse by neglect cause of action fails to allege sufficient facts with particularity to state a statutory cause of action for elder abuse; inasmuch as the facts were not pled with sufficient particularity, the elder abuse by neglect cause of action is uncertain and ambiguous; the financial elder abuse cause of action fails to alleged sufficient facts to state such a cause of action and is uncertain and ambiguous; the violation of the patient's bill of rights cause of action fails to allege sufficient facts with particularity to state such a statutory cause of action for violation of the patient's bill of rights and, as a result, is vague and ambiguous; the allegations of the fraud action are insufficient and also uncertain and ambiguous; the causes of action for fraud, financial elder abuse, and unfair business practices are duplicative; the wrongful death cause of action fails to allege sufficient facts with particularity to state a statutory cause of action for

wrongful death; inasmuch as the facts were not pled with sufficient particularity, the wrongful death cause of action is uncertain and ambiguous; and the claims related to plaintiffs' decedent's treatment and monitoring during the course of her COVID-19 infection in January 2021 is covered by the PREP Act and, therefore, defendants are immune from liability.

Plaintiffs oppose the demurrers on the following grounds: the demurrers of defendants Cameron Park Senior Living, LLC, Sequoia Senior Living, LLC, and Kasner should be overruled, because the demurrers are untimely; the meet and confer process was late as defendants did not meet and confer by correspondence until April 18, 2022; the elder abuse by neglect cause of action sufficiently states a cause of action, because plaintiffs allege the defendants failed to protect the elder decedent from health and safety hazards and defendants recklessly committed the neglect by following a pattern and practice of understaffing that defendants had notice of and ratified by making a conscious business decision to understaff the facility; the elder abuse by neglect cause of action is not uncertain; the resident's bill of rights cause of action is sufficiently alleged and not uncertain and ambiguous; the fraud/misrepresentation cause of action is sufficiently alleged; the financial elder abuse cause of action is sufficiently pled; a duplicate claim is not a proper basis for demurrer; the wrongful death claim is not uncertain, ambiguous or defective; the PREP Act does not apply and defendants are not immune from liability; and in the event that any demurrer is sustained, leave to amend should be granted.

Defendants replied to the opposition.

Timeliness of Demurrer

Plaintiffs argue that the demurrers of defendants Cameron Park Senior Living, LLC, Sequoia Senior Living, LLC, and Kasner were untimely and should be overruled, because their responses to the complaint were due on March 10, March 12, and March 19, 2022 respectively

and their declaration to extend the time to respond to the complaint in order to meet and confer was untimely filed more than 30 days after each defendant was served without any attempt to meet and confer prior to filing the declaration

Plaintiffs essentially argue the court should exercise its discretion to not consider a late filed demurrer.

"It is well settled that a plaintiff's failure to have the defendant's default regularly entered is an implied grant of further time to the defendant in which to appear in the action. *Tregambo v. Comanche Mill & Mining Co.*, 57 Cal. 501; *Reher v. Reed*, 166 Cal. 525, 528, 137 P. 263, 264, Ann. Cas. 1915C, 737; *Lunnun v. Morris*, 7 Cal. App. 710, 95 P. 907; *Mitchell v. Banking Corp.*, 81 Mont. 459, 264 P. 127." (Baird v. Smith (1932) 216 Cal. 408, 409.)

Plaintiffs did not seek entry of the default of defendants Cameron Park Senior Living, LLC, Sequoia Senior Living, LLC, and Kasner when they allegedly failed to timely file the demurrer, therefore, defendants had an implied grant of further time to appear in this action by filing the demurrer on April 20, 2022. The court rejects the plaintiffs' argument that the demurrer was untimely filed and will consider the demurrer.

Meet and Confer Requirement

Plaintiffs argue the demurrers should be overruled,, because there was no meet and confer prior to the filing of the demurrer, it was not until defendant's April 18, 2022 correspondence that there was any attempt to meet and confer, defendants admitted in that correspondence that no meet and confer conduct had taken place due to a snafu at the office, and plaintiffs did not grant an extension of time given that defendants had more than enough time to meet and confer.

"(a) Before filing a demurrer pursuant to this chapter, the demurring party shall meet and confer in person or by telephone with the party who filed the pleading that is subject to

demurrer for the purpose of determining whether an agreement can be reached that would resolve the objections to be raised in the demurrer. If an amended complaint, cross-complaint, or answer is filed, the responding party shall meet and confer again with the party who filed the amended pleading before filing a demurrer to the amended pleading. ¶ (1) As part of the meet and confer process, the demurring party shall identify all of the specific causes of action that it believes are subject to demurrer and identify with legal support the basis of the deficiencies. The party who filed the complaint, cross-complaint, or answer shall provide legal support for its position that the pleading is legally sufficient or, in the alternative, how the complaint, cross-complaint, or answer could be amended to cure any legal insufficiency. ¶ (2) The parties shall meet and confer at least five days before the date the responsive pleading is due. If the parties are not able to meet and confer at least five days prior to the date the responsive pleading is due, the demurring party shall be granted an automatic 30-day extension of time within which to file a responsive pleading, by filing and serving, on or before the date on which a demurrer would be due, a declaration stating under penalty of perjury that a good faith attempt to meet and confer was made and explaining the reasons why the parties could not meet and confer. The 30-day extension shall commence from the date the responsive pleading was previously due, and the demurring party shall not be subject to default during the period of the extension. Any further extensions shall be obtained by court order upon a showing of good cause. ¶ (3) The demurring party shall file and serve with the demurrer a declaration stating either of the following: ¶ (A) The means by which the demurring party met and conferred with the party who filed the pleading subject to demurrer, and that the parties did not reach an agreement resolving the objections raised in the demurrer. ¶ (B) That the party who filed the pleading subject to demurrer failed to respond to the meet and confer request of the demurring party or otherwise failed to meet and confer in good faith. ¶ (4) Any determination by the court that the

meet and confer process was insufficient shall not be grounds to overrule or sustain a demurrer." (Emphasis added.) (Code of Civil Procedure, § 430.41(a).)

Any deficiency in the meet and confer process not being grounds to sustain the demurrers, the demurrer on the ground of insufficient meet and confer activities is overruled.

Demurrer Principles

When any ground for objection to a complaint appears on its face, or from any matter of which the court is required to or may take judicial notice, the objection on that ground may be taken by demurrer to the pleading. (Code of Civil Procedure, § 430.30(a).)

"'A demurrer admits all material and issuable facts properly pleaded. [Citations.] However, it does not admit contentions, deductions or conclusions of fact or law alleged therein.' (*Daar v. Yellow Cab Co.* (1967) 67 Cal.2d 695, 713 [63 Cal.Rptr. 724, 433 P.2d 732].) Also, '... "plaintiff need only plead facts showing that he may be entitled to some relief [citation]." [Citation.] Furthermore, we are not concerned with plaintiff's possible inability or difficulty in proving the allegations of the complaint.' (*Gruenberg v. Aetna Ins. Co.* (1973) 9 Cal.3d 566, 572 [108 Cal.Rptr. 480, 510 P.2d 1032].)" (Highlanders, Inc. v. Olsan (1978) 77 Cal.App.3d 690, 696-697.)

"A demurrer challenges only the legal sufficiency of the complaint, not the truth of its factual allegations or the plaintiff's ability to prove those allegations. (*Amarel v. Connell* (1988) 202 Cal.App.3d 137, 140 [248 Cal.Rptr. 276].) We therefore treat as true all of the complaint's material factual allegations, but not contentions, deductions or conclusions of fact or law. (*Id*. at p. 141; *Blank v. Kirwan* (1985) 39 Cal.3d 311, 318 [216 Cal.Rptr. 718, 703 P.2d 58].) We can also consider the facts appearing in exhibits attached to the complaint. (See *Dodd v. Citizens Bank of Costa Mesa*, supra, 222 Cal.App.3d at p. 1627.) We are required to construe the complaint liberally to determine whether a cause of action has been stated, given the assumed

truth of the facts pleaded. (*Rogoff v. Grabowski* (1988) 200 Cal.App.3d 624, 628 [246 Cal.Rptr. 185].)" (Picton v. Anderson Union High School Dist. (1996) 50 Cal.App.4th 726, 732-733.)

""To determine whether a cause of action is stated, the appropriate question is whether, upon a consideration of all the facts alleged, it appears that the plaintiff is entitled to any judicial relief against the defendant, notwithstanding that the facts may not be clearly stated, or may be intermingled with a statement of other facts irrelevant to the cause of action shown, or although the plaintiff may demand relief to which he is not entitled under the facts alleged. (*Elliott v. City of Pacific Grove*, 54 Cal.App.3d 53, 56, 126 Cal.Rptr. 371.) Mistaken labels and confusion of legal theory are not fatal because the doctrine of "theory of the pleading" has long been repudiated in this state. (*Lacy v. Laurentide Finance Corp*., 28 Cal.App.3d 251, 256-257, 104 Cal.Rptr. 547.)" (Spurr v. Spurr (1979) 88 Cal.App.3d 614, 617.)

The rule is that a general demurrer should be overruled if the pleading, liberally construed, states a cause of action under any theory. (Brousseau v. Jarrett (1977) 73 Cal.App.3d 864, 870-871.)

With the above-cited principles in mind, the court will rule on the demurrers.

Defendants' Request for Judicial Notice and Plaintiffs' Objections to the Requests

Defendants request the court take judicial notice of a printout from the California Department of Social Services website regarding the subject facility (Exhibit A) and correspondence from the California Department of Social Services, Community Care Licensing Division, dated January 3, 2022, which states that defendant Cameron Park Senior Living, LLC's appeal was granted, and the citation dismissed.

Plaintiffs alleged: the Department substantiated the complaint finding that plaintiff had become severely dehydrated and had a UTI due to defendants' lack of care and supervision, found defendants failed to provide her with food and water for 2–3 days, and that defendants'

facility failed to promptly report her condition to medical staff; and defendants were cited with two Type-A deficiencies because of these failures. (Complaint, paragraph 27.)

"Because a demurrer challenges defects on the face of the complaint, it can only refer to matters outside the pleading that are subject to judicial notice. (*Blank v. Kirwan, supra,* 39 Cal.3d at p. 318, 216 Cal.Rptr. 718, 703 P.2d 58; *County of Fresno v. Shelton* (1998) 66 Cal.App.4th 996, 1008–1009, 78 Cal.Rptr.2d 272.) We must take judicial notice of matters properly noticed by the trial court, and may take notice of any matter specified in Evidence Code section 452. (Evid.Code, § 459, subd. (a).) While we may take judicial notice of court records and official acts of state agencies (Evid.Code, § 452, subds.(c), (d)), the truth of matters asserted in such documents is not subject to judicial notice. (*Sosinsky v. Grant* (1992) 6 Cal.App.4th 1548, 1564–1565, 8 Cal.Rptr.2d 552.) We also may decline to take judicial notice of matters that are not relevant to dispositive issues on appeal. (*Doe v. City of Los Angeles* (2007) 42 Cal.4th 531, 544, fn. 4, 67 Cal.Rptr.3d 330, 169 P.3d 559; *Schifando v. City of Los Angeles, supra,* 31 Cal.4th at p. 1089, fn. 4, 6 Cal.Rptr.3d 457, 79 P.3d 569.)" (Emphasis added.) (Arce v. Kaiser Foundation Health Plan, Inc. (2010) 181 Cal.App.4th 471, 482.)

"As we observed in *Mangini,* although "courts may notice official acts and public records, 'we do not take judicial notice of the truth of all matters stated therein.' [Citations.] '[T]he taking of judicial notice of the official acts of a governmental entity does not in and of itself require acceptance of the truth of factual matters which might be deduced therefrom, since in many instances what is being noticed, and thereby established, is no more than the existence of such acts and not, without supporting evidence, what might factually be associated with or flow therefrom.' " (*Id.,* at pp. 1063–1064, 31 Cal.Rptr.2d 358, 875 P.2d 73.)" (Emphasis added.) (People v. Castillo (2010) 49 Cal.4th 145, 157.)

Exhibit A to the defendants' request for judicial notice (RJN) does not appear to state any official act taken by the Department of Social Services and is only a list of 41 visits to the subject facility. Exhibit A also states at the conclusion of the list that "All visits incudes Inspection Visits, other visits and may include complaint visits". (Emphasis added.) In other words, the list admittedly does not identify complaint visits and is not designed to set forth a history of complaints against the facility. It is the party requesting judicial notice of material that must provide the court and each party with a copy of the material establishing the facts and matters of which judicial notice is requested. (See Rules of Court, Rule 3.1306(c).) The court may not take judicial notice of the truth of any fact concerning the history of Department complaints or citations regarding the subject facility from Exhibit A. The objection to taking judicial notice of RJN Exhibit A is sustained.

Exhibit B is a letter from the Department of Social Services, Community Care Licensing Division granting a first level administrative appeal from two citations. The objection to RJN Exhibit B is sustained as to the facts and factual findings stated in the letter. The court takes judicial notice that on January 3, 2022, the Department of Social Services, Community Care Licensing Division granted defendant's first level administrative appeal and dismissed the citations.

The complaint alleges: after the Department of Social Services investigated the plaintiffs' complaint regarding defendants failure to provide necessities such as food and water to plaintiffs' decedent during isolation, the Department substantiated the complaint finding that she had become severely dehydrated and had a UTI due to defendants' lack of care and supervision, found defendants failed to provide her with food and water for 2–3 days, and that defendants' facility failed to promptly report her condition to medical staff; and defendants were cited with two Type-A deficiencies as a result of these failures. (Complaint, paragraph 27.)

"'In ruling on a demurrer, a court may consider facts of which it has taken judicial notice. (§ 430.30, subd. (a).) This includes the existence of a document. When judicial notice is taken of a document, however, the truthfulness and proper interpretation of the document are disputable. [Citation.]' [Citation.]" (*Fremont, supra,* 148 Cal.App.4th at p. 113, 55 Cal.Rptr.3d 621.) Moreover, " 'Taking judicial notice of a document is not the same as accepting the truth of its contents or accepting a particular interpretation of its meaning. [Citation.] On a demurrer a court's function is limited to testing the legal sufficiency of the complaint. [Citation.] "A demurrer is simply not the appropriate procedure for determining the truth of disputed facts." [Citation.] The hearing on demurrer may not be turned into a contested evidentiary hearing through the guise of having the court take judicial notice of documents whose truthfulness or proper interpretation are disputable. [Citation.] ... " '[J]udicial notice of matters upon demurrer will be dispositive only in those instances where there is not or cannot be a factual dispute concerning that which is sought to be judicially noticed.' " [Citation.]' " (*Id.* at pp. 113–114, 55 Cal.Rptr.3d 621.)" (Emphasis added.) (Unruh-Haxton v. Regents of University of California (2008) 162 Cal.App.4th 343, 364–365.)

The fact that defendant Cameron Park Senior Living, LLC's appeal was granted and citations dismissed does not establish for the purposes of demurrer that the citations at issue in that appeal was the result of the plaintiffs' complaint that plaintiff had become severely dehydrated and had a UTI due to defendants' lack of care and supervision, defendants failure to provide her with food and water for 2–3 days, and that defendants' facility failed to promptly report her condition to medical staff, which resulted in two Type-A deficiencies. The truthfulness and proper interpretation of the January 3, 2022, grant of appeal are disputable. Therefore, judicial notice of the fact that an appeal was granted, and citation dismissed does

not controvert the above-cited allegations of the complaint. The objection to taking judicial notice of RJN Exhibit A is sustained.

Federal Public Readiness and Emergency Preparedness Act (PREP) Immunity

Defendants argue that to the extent that defendants administered any treatment protocol, medication, personal protective equipment, coordination of telehealth visits, or isolation procedures, as directed by the Department of Social Services and El Dorado County Department of Public Health, plaintiffs' claims are insufficient to state a cause of action for either negligence or neglect related to plaintiffs' decedent's COVID -19 infection, because defendants are immune from such liability.

"(a) Liability protections ¶ (1) In general ¶ Subject to the other provisions of this section, a covered person shall be immune from suit and liability under Federal and State law with respect to all claims for loss caused by, arising out of, relating to, or resulting from the administration to or the use by an individual of a covered countermeasure if a declaration under subsection (b) has been issued with respect to such countermeasure." (Emphasis added.) (42 USC § 247d-6d(a)(1).)

"**(B) Scope ¶** The immunity under paragraph (1) applies to any claim for loss that has a causal relationship with the administration to or use by an individual of a covered countermeasure, including a causal relationship with the design, development, clinical testing or investigation, manufacture, labeling, distribution, formulation, packaging, marketing, promotion, sale, purchase, donation, dispensing, prescribing, administration, licensing, or use of such countermeasure." (42 USC § 247d-6d(a)(2)(B).)

"(3) Certain conditions ¶ Subject to the other provisions of this section, immunity under paragraph (1) with respect to a covered countermeasure applies only if-- ¶ **(A)** the countermeasure was administered or used during the effective period of the declaration that

was issued under subsection (b) with respect to the countermeasure; ¶ **(B)** the countermeasure was administered or used for the category or categories of diseases, health conditions, or threats to health specified in the declaration; and ¶ **(C)** in addition, in the case of a covered person who is a program planner or qualified person with respect to the administration or use of the countermeasure, the countermeasure was administered to or used by an individual who-- ¶ **(i)** was in a population specified by the declaration; and ¶ **(ii)** was at the time of administration physically present in a geographic area specified by the declaration or had a connection to such area specified in the declaration." (42 USC § 247d-6d(a)(3).)

"**(d) Exception to immunity of covered persons ¶ (1) In general ¶** Subject to subsection (f), the sole exception to the immunity from suit and liability of covered persons set forth in subsection (a) shall be for an exclusive Federal cause of action against a covered person for death or serious physical injury proximately caused by willful misconduct, as defined pursuant to subsection (c), by such covered person. For purposes of section 2679(b)(2)(B) of Title 28, such a cause of action is not an action brought for violation of a statute of the United States under which an action against an individual is otherwise authorized. ¶ **(2) Persons who can sue ¶** An action under this subsection may be brought for wrongful death or serious physical injury by any person who suffers such injury or by any representative of such a person." (42 U.S.C. § 247d-6d.)

"**(i) Definitions ¶** In this section: ¶ **(1) Covered countermeasure ¶** The term "covered countermeasure" means-- ¶ **(A)** a qualified pandemic or epidemic product (as defined in paragraph (7)); ¶ **(B)** a security countermeasure (as defined in section 247d-6b(c)(1)(B) of this title); ¶ **(C)** a drug (as such term is defined in section 201(g)(1) of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 321(g)(1)),[2] biological product (as such term is defined by section 262(i) of this title), or device (as such term is defined by section 201(h) of the Federal Food,

Drug and Cosmetic Act (21 U.S.C. 321(h)) that is authorized for emergency use in accordance with section 564, 564A, or 564B of the Federal Food, Drug, and Cosmetic Act; or ¶ **(D)** a respiratory protective device that is approved by the National Institute for Occupational Safety and Health under part 84 of title 42, Code of Federal Regulations (or any successor regulations), and that the Secretary determines to be a priority for use during a public health emergency declared under section 247d of this title. ¶ **(2) Covered person ¶** The term "covered person", when used with respect to the administration or use of a covered countermeasure, means-- ¶ **(A)** the United States; or ¶ **(B)** a person or entity that is-- ¶ **(i)** a manufacturer of such countermeasure; ¶ **(ii)** a distributor of such countermeasure; ¶ **(iii)** a program planner of such countermeasure; ¶ **(iv)** a qualified person who prescribed, administered, or dispensed such countermeasure; or ¶ **(v)** an official, agent, or employee of a person or entity described in clause (i), (ii), (iii), or (iv). ¶ **(3) Distributor ¶** The term "distributor" means a person or entity engaged in the distribution of drugs, biologics, or devices, including but not limited to manufacturers; repackers; common carriers; contract carriers; air carriers; own-label distributors; private-label distributors; jobbers; brokers; warehouses, and wholesale drug warehouses; independent wholesale drug traders; and retail pharmacies. ¶ **(4) Manufacturer ¶** The term "manufacturer" includes-- ¶ **(A)** a contractor or subcontractor of a manufacturer; ¶ **(B)** a supplier or licenser of any product, intellectual property, service, research tool, or component or other article used in the design, development, clinical testing, investigation, or manufacturing of a covered countermeasure; and ¶ **(C)** any or all of the parents, subsidiaries, affiliates, successors, and assigns of a manufacturer. ¶ **(5) Person**

The term "person" includes an individual, partnership, corporation, association, entity, or public or private corporation, including a Federal, State, or local government agency or department. ¶ **(6) Program planner ¶** The term "program planner" means a State or local government,

including an Indian tribe, a person employed by the State or local government, or other person who supervised or administered a program with respect to the administration, dispensing, distribution, provision, or use of a security countermeasure or a qualified pandemic or epidemic product, including a person who has established requirements, provided policy guidance, or supplied technical or scientific advice or assistance or provides a facility to administer or use a covered countermeasure in accordance with a declaration under subsection (b). ¶ **(7) Qualified pandemic or epidemic product ¶** The term "qualified pandemic or epidemic product" means a drug (as such term is defined in section 201(g)(1) of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 321(g)(1)),[2] biological product (as such term is defined by section 262(i) of this title), or device (as such term is defined by section 201(h) of the Federal Food, Drug and Cosmetic Act (21 U.S.C. 321(h))[2] that is-- ¶ **(A)(i)** a product manufactured, used, designed, developed, modified, licensed, or procured-- ¶ **(I)** to diagnose, mitigate, prevent, treat, or cure a pandemic or epidemic; or ¶ **(II)** to limit the harm such pandemic or epidemic might otherwise cause; ¶ **(ii)** a product manufactured, used, designed, developed, modified, licensed, or procured to diagnose, mitigate, prevent, treat, or cure a serious or life-threatening disease or condition caused by a product described in clause (i); or ¶ **(iii)** a product or technology intended to enhance the use or effect of a drug, biological product, or device described in clause (i) or (ii); and ¶ **(B)(i)** approved or cleared under chapter V of the Federal Food, Drug, and Cosmetic Act or licensed under section 262 of this title; ¶ **(ii)** the object of research for possible use as described by subparagraph (A) and is the subject of an exemption under section 505(i) or 520(g) of the Federal Food, Drug, and Cosmetic Act; or ¶ **(iii)** authorized for emergency use in accordance with section 564, 564A, or 564B of the Federal Food, Drug, and Cosmetic Act. ¶ **(8) Qualified person ¶** The term "qualified person", when used with respect to the administration or use of a covered countermeasure, means-- ¶

(A) a licensed health professional or other individual who is authorized to prescribe, administer, or dispense such countermeasures under the law of the State in which the countermeasure was prescribed, administered, or dispensed; or ¶ **(B)** a person within a category of persons so identified in a declaration by the Secretary under subsection (b). ¶ **(9) Security countermeasure ¶** The term "security countermeasure" has the meaning given such term in section 247d-6b(c)(1)(B) of this title. ¶ **(10) Serious physical injury ¶** The term "serious physical injury" means an injury that-- ¶ **(A)** is life threatening; ¶ **(B)** results in permanent impairment of a body function or permanent damage to a body structure; or ¶ **(C)** necessitates medical or surgical intervention to preclude permanent impairment of a body function or permanent damage to a body structure." (42 U.S.C. § 247d-6d(i).)

"**(b) Payment of compensation ¶ (1) In general ¶** If the Secretary issues a declaration under 247d-6d(b) of this title, the Secretary shall, after amounts have by law been provided for the Fund under subsection (a), provide compensation to an eligible individual for a covered injury directly caused by the administration or use of a covered countermeasure pursuant to such declaration. ¶ **(2) Elements of compensation ¶** The compensation that shall be provided pursuant to paragraph (1) shall have the same elements, and be in the same amount, as is prescribed by sections 239c, 239d, and 239e of this title in the case of certain individuals injured as a result of administration of certain countermeasures against smallpox, except that section 239e(a)(2)(B) of this title shall not apply." (42 U.S.C. § 247d-6e(b)(1) and (b)(2).)

"**(d) Exhaustion; exclusivity; election ¶ (1) Exhaustion ¶** Subject to paragraph (5), a covered individual may not bring a civil action under section 247d-6d(d) of this title against a covered person (as such term is defined in section 247d-6d(i)(2) of this title) unless such individual has exhausted such remedies as are available under subsection (a), except that if amounts have not by law been provided for the Fund under subsection (a), or if the Secretary

fails to make a final determination on a request for benefits or compensation filed in accordance with the requirements of this section within 240 days after such request was filed, the individual may seek any remedy that may be available under section 247d-6d(d) of this title. ¶ **(2) Tolling of statute of limitations ¶** The time limit for filing a civil action under section 247d-6d(d) of this title for an injury or death shall be tolled during the pendency of a claim for compensation under subsection (a). ¶ **(3) Rule of construction** This section shall not be construed as superseding or otherwise affecting the application of a requirement, under chapter 171 of Title 28, to exhaust administrative remedies. ¶ **(4) Exclusivity ¶** The remedy provided by subsection (a) shall be exclusive of any other civil action or proceeding for any claim or suit this section encompasses, except for a proceeding under section 247d-6d of this title. ¶ **(5) Election ¶** If under subsection (a) the Secretary determines that a covered individual qualifies for compensation, the individual has an election to accept the compensation or to bring an action under section 247d-6d(d) of this title. If such individual elects to accept the compensation, the individual may not bring such an action." (42 U.S.C. § 247d-6e(b)(1)-(b)(5).)

Defendants have not drawn the court's attention to any facts alleged in the complaint that any of the causes of action are asserting claims premised upon activities involving the administration or use of COVID-19 medical countermeasures. In fact, taking as true for the purposes of this demurrer the facts supporting the claims of mistreatment during plaintiffs' decedent's isolation after being diagnosed with COVID-19 could not be reasonably construed in any manner as being a COVID-19 medical countermeasure or an isolation protocol directed by the Department of Social Services and El Dorado County Department of Public Health such that defendants are immunized from liability.

Plaintiffs alleged: after plaintiffs' decedent tested positive for COVID-19 in January 2021, defendant was isolated in her room; while defendants advised plaintiffs that plaintiff's decedent

was doing well and eating and drinking, in reality defendants withheld food and water from plaintiff's decedent for two to three days, resulting in plaintiffs' decedent becoming severely dehydrated; a doctor from Marshall Medical Center called plaintiffs' decedent's daughter and advised her that plaintiff's decedent had taken a turn for the worse and either had to be made comfortable with hospice care, or discharged to the hospital; she was discharged to the Mercy Hospital Emergency Department where she was diagnosed with severe dehydration, a urinary tract infection (UTI), and hypernatremia; after the Department of Social Services investigated the plaintiffs' complaint regarding defendants failure to provide necessities such as food and water to plaintiffs' decedent during isolation, the Department substantiated the complaint finding that she had become severely dehydrated and had a UTI due to defendants' lack of care and supervision, found defendants failed to provide her with food and water for 2–3 days, and that defendants' facility failed to promptly report her condition to medical staff; and defendants were cited with two Type-A deficiencies as a result of these failures. (Complaint, paragraph 27.)

The face of the complaint not having raised a claim arising from alleged activities by defendants involving the administration or use of a COVID-19 medical countermeasures, the demurrer to the complaint on this ground is overruled.

Elder Abuse by Neglect Cause of Action

""Elder" means any person residing in this state, 65 years of age or older." (Welfare and Institutions Code, § 15610.27.)

""Abuse of an elder or a dependent adult" means either of the following: ¶ (a) Physical abuse, neglect, financial abuse, abandonment, isolation, abduction, or other treatment with resulting physical harm or pain or mental suffering." (Welfare and Institutions Code, § 15610.07.)

"(a) "Neglect" means either of the following: ¶ (1) The negligent failure of any person having the care or custody of an elder or a dependent adult to exercise that degree of care that a reasonable person in a like position would exercise. ¶ (2) The negligent failure of an elder or dependent adult to exercise that degree of self care that a reasonable person in a like position would exercise." (Welfare & Institutions Code, § 15610.57(a).)

"(b) Neglect includes, but is not limited to, all of the following: ¶ (1) Failure to assist in personal hygiene, or in the provision of food, clothing, or shelter. ¶ (2) Failure to provide medical care for physical and mental health needs. A person shall not be deemed neglected or abused for the sole reason that the person voluntarily relies on treatment by spiritual means through prayer alone in lieu of medical treatment. ¶ (3) Failure to protect from health and safety hazards. ¶ (4) Failure to prevent malnutrition or dehydration. ¶ (5) Substantial inability or failure of an elder or dependent adult to manage their own finances. ¶ (6) Failure of an elder or dependent adult to satisfy any of the needs specified in paragraphs (1) to (5), inclusive, for themselves as a result of poor cognitive functioning, mental limitation, substance abuse, or chronic poor health." (Welfare & Institutions Code, § 15610.57(b).)

"To establish elder abuse, a plaintiff must show defendant was guilty of "recklessness, oppression, fraud, or malice in the commission of physical, neglectful, or financial elder abuse]." (Welf. & Inst.Code, § 15657.)" (Benun v. Superior Court (2004) 123 Cal.App.4th 113, 119.)

"The elements of a cause of action under the Elder Abuse and Dependent Adults Act, section 15600 et seq. (hereinafter the Elder Abuse Act) are statutory, and reflect the Legislature's intent to provide enhanced remedies to encourage private, civil enforcement of laws against elder abuse and neglect. (See *Delaney v. Baker* (1999) 20 Cal.4th 23, 33, 82 Cal.Rptr.2d 610, 971 P.2d 986 (*Delaney*).) One of the remedial purposes of the Elder Abuse

Act is to protect elder or dependent adults who are residents of nursing homes. (Id. at p. 40, 82 Cal.Rptr.2d 610, 971 P.2d 986.) Therefore, "[w]here it is proven by clear and convincing evidence that a defendant is liable for physical abuse as defined in Section 15610.63, neglect as defined in Section 15610.57, or financial abuse as defined in Section 15610.30, and that the defendant has been guilty of recklessness, oppression, fraud, or malice in the commission of this abuse, in addition to all other remedies otherwise provided by law: [¶] (a) The court shall award to the plaintiff reasonable attorney's fees and costs." (§ 15657; *Marron v. Superior Court*, supra, 108 Cal.App.4th at p. 1058, 134 Cal.Rptr.2d 358.) Further, in a wrongful death action involving abuse or neglect of an elderly or dependent adult, damages for pain and suffering may be awarded. (§ 15657, subd. (b); *Community Care and Rehabilitation Center v. Superior Court* (2000) 79 Cal.App.4th 787, 792, 94 Cal.Rptr.2d 343.)" (Intrieri v. Superior Court (2004) 117 Cal.App.4th 72, 82.)

In order to sufficiently state an elder abuse by neglect cause of action, the plaintiffs must meet the requirements of Section 15657. (Benun v. Superior Court (2004) 123 Cal.App.4th 113, 119.) "The sponsor of the elder abuse legislation took the position that the high standard of proof imposed by section 15657—clear and convincing evidence of liability, and a showing of recklessness, malice, oppression, or fraud—adequately protects providers of care from liability for acts of simple negligence, or even gross negligence. The sponsor urged that existing limitations on damages and attorney fees should not apply in such extreme cases. (*Delaney, supra,* at p. 32, 82 Cal.Rptr.2d 610, 971 P.2d 986.) ¶ The purpose of the Elder Abuse Act "is essentially to protect a particularly vulnerable portion of the population from gross mistreatment in the form of abuse and custodial neglect." (*Delaney, supra,* at p. 33, 82 Cal.Rptr.2d 610, 971 P.2d 986.)" (Benun v. Superior Court (2004) 123 Cal.App.4th 113, 123.)

"To obtain the remedies provided by the Act pursuant to section 15657, "a plaintiff must demonstrate by clear and convincing evidence that defendant is guilty of something more than negligence; he or she must show reckless, oppressive, fraudulent, or malicious conduct." (*Delaney, supra,* 20 Cal.4th at p. 31, 82 Cal.Rptr.2d 610, 971 P.2d 986.) Recklessness refers " 'to a subjective state of culpability greater than simple negligence, which has been described as a "deliberate disregard" of the "high degree of probability" that an injury will occur.' " (*Ibid.*) Oppression, fraud and malice involve intentional or conscious wrongdoing of a despicable or injurious nature. (*Ibid.*) ¶ Our Supreme Court teaches that neglect under the Act "refers not to the substandard performance of medical services but, rather, to the 'failure of those responsible for attending to the basic needs and comforts of elderly or dependent adults, regardless of their professional standing, to carry out their custodial obligations.' [Citation.] Thus, the statutory definition of 'neglect' speaks not of the *undertaking* of medical services, but of the failure to *provide* medical care. [Citation.]" (*Covenant Care, supra,* 32 Cal.4th at p. 783, 11 Cal.Rptr.3d 222, 86 P.3d 290.)" (Sababin v. Superior Court (2006) 144 Cal.App.4th 81, 88-89.)

""The purpose of the [Act was] essentially to protect a particularly vulnerable portion of the population from gross mistreatment in the form of abuse and custodial neglect." (*Delaney, supra,* 20 Cal.4th at p. 33, 82 Cal.Rptr.2d 610, 971 P.2d 986.) To this end, the Legislature added to the Act heightened civil remedies for egregious elder abuse, seeking thereby "to enable interested persons to engage attorneys to take up the cause of abused elderly persons and dependent adults." (Welf. & Inst.Code, § 15600, subd. (j).)" (Covenant Care, Inc. v. Superior Court (2004) 32 Cal.4th 771, 787.)

"To recover the enhanced remedies available under the Elder Abuse Act from a health care provider, a plaintiff must prove more than simple or even gross negligence in the provider's

care or custody of the elder. (Welf. & Inst.Code, § 15657.2; *Delaney, supra,* 20 Cal.4th at p. 32, 82 Cal.Rptr.2d 610, 971 P.2d 986; *Sababin v. Superior Court* (2006) 144 Cal.App.4th 81, 88, 50 Cal.Rptr.3d 266 (*Sababin*).) The plaintiff must prove "by clear and convincing evidence" that "the defendant has been guilty of recklessness, oppression, fraud, or malice in the commission of" the neglect. (Welf. & Inst.Code, § 15657.) Oppression, fraud and malice "involve 'intentional,' 'willful,' or 'conscious' wrongdoing of a 'despicable' or 'injurious' nature." (*Delaney,* at p. 31, 82 Cal.Rptr.2d 610, 971 P.2d 986.) Recklessness involves " 'deliberate disregard' of the 'high degree of probability' that an injury will occur" and "rises to the level of a 'conscious choice of a course of action ... with knowledge of the serious danger to others involved in it.' " (*Id.* at pp. 31–32, 82 Cal.Rptr.2d 610, 971 P.2d 986.) Thus, the enhanced remedies are available only for " 'acts of egregious abuse' against elder and dependent adults." (*Id.* at p. 35, 82 Cal.Rptr.2d 610, 971 P.2d 986; see also *Covenant Care, supra,* 32 Cal.4th at p. 786, 11 Cal.Rptr.3d 222, 86 P.3d 290["statutory elder abuse may include the egregious withholding of medical care for physical and mental health needs"].) In short, "[i]n order to obtain the Act's heightened remedies, a plaintiff must allege conduct essentially equivalent to conduct that would support recovery of punitive damages." (*Covenant Care,* at p. 789, 11 Cal.Rptr.3d 222, 86 P.3d 290.)" (Carter v. Prime Healthcare Paradise Valley LLC (2011) 198 Cal.App.4th 396, 405.)

Plaintiffs allege that defendants were assisted living care providers, residential care facilities for the elderly and care custodians in the business of providing memory care services for the elderly; and/or managed, owned, maintained, and/or operated the subject residential care facilities. (Complaint, paragraphs 7-11.) The complaint does not allege that the defendants are medical care providers who provided negligent/substandard medical care. Instead, it is alleged

that the claims against them are premised upon gross mistreatment in the form of custodial neglect.

Plaintiff incorporate by reference the allegations of paragraph 27 of the complaint into the elder abuse by neglect cause of action and further incorporates the following allegations: plaintiff's decedent was admitted to the subject facility in 2017 when she was 85 years-old and suffering from Alzheimer's dementia; due to her condition, she was dependent on others for her care needs and was a high fall risk due to wandering and dementia, which was known by defendants as they assessed her to determine if she was appropriate for the facility; the assessment called for extensive assistance to be provided to prevent falls and significant assistance with showering, dressing, and transfers; the assessment also called for frequent checks as she required assistance with toileting, bathing, dressing and socializing; although defendants knew she could ambulate on her own and tended to wander due to dementia, defendants did not appropriately develop or initiate a care plan to meet her needs; defendants failed to supervise and assist her with eating and drinking and failed to provide her with assistance when she needed it and called for help; as a result she was found on May 8, 2018 on the floor of the front lobby after an unwitnessed fall, on February 19, 2019 staff found her on her bathroom from after a unwitnessed fall, and on July 12, 2019 she was found on the ground after another unwitnessed fall; she was bleeding from the head after the July 2019 fall and was transported to the hospital emergency room receiving head imaging and eleven sutures to the head and was held for observation; defendants failed to reassess her needs and provide needed supervision even after these three unwitnessed falls; on February 24, 2020 she fell again and was unattended on the floor for hours throughout the night; when she was found, she was returned to her room without any assessment or medical examination or care; staff noticed discoloration of her right hand; the defendants failed to fully inform plaintiff Hoaglund

about the fall, instead downplaying the incident and telling plaintiff that she had bruised her hand; the next day she was sent to the hospital emergency room where she was diagnosed as suffering from a left wrist fracture and displaced left hip fracture; following hip surgery she was returned to the facility and she was required to undergo physical therapy; defendants represented to her family that she would receive the physical therapy according to doctor orders; defendants delayed arranging for such therapy and only arranged the therapy after multiple calls and requests by her daughter; defendants, their owners, officers, directors, managing agents and staff, including defendant Kasner, had actual and constructive knowledge of the requirements for custodial care at the time plaintiff's decedent was admitted to the facility and thus knew that a failure to implement, follow, and enforce the applicable regulations deprived plaintiffs' decedent of custodial care and amounted to reckless neglect; defendants knew that plaintiff's decedent was at fall risk that required supervision and check-ins to prevent/reduce the risk of falls yet having specific notice of this, defendants continued to fail to provide those services eventually causing plaintiff's decedent to suffer injuries, including a left wrist fracture and displaced hip fracture; defendants then delayed assessment of her and seeking medical care for the injuries; plaintiff also suffered severe dehydration and a UTI by defendants withholding basic care such as supervision, water and food; this subjected plaintiffs' decedent to severe and extreme physical pain and suffering injuries, and mental anguish and distress; defendants violated 22 CCR § 87411 by failing to staff at the facility in sufficient numbers and with the competency to provide the services necessary to meet plaintiffs' decedents' needs and failed to provide staff that was appropriately trained; defendants violated 22 CCR § 87464 by failing to meet plaintiffs' decedent's needs and failing to provide basic services such as care and supervision, a safe and healthful living environment, personal assistance with daily living and care as needed by plaintiffs' decedent

and failing to provide regular observation; and as part of defendants' general business practice defendants made a conscious, calculated choice to reduce staff to save money on personnel costs, resulting in the building being understaffed, yet defendants improperly accepted and retained high acuity patients to maximize profits directly or indirectly, despite knowing their legal obligations under state regulation and other laws to staff the facility to meet the resident's needs and not retain residents with prohibited conditions; defendants knew that adverse consequences would flow from the understaffing including mistreatment and neglect of their elderly and vulnerable residents; and defendant willfully and recklessly made a calculated decision to promote their financial condition at the expense of their legal and fiduciary obligations to their elderly and dementia residents, including plaintiffs' decedent. (Complaint paragraphs 23-26, 32, 33, 38, 40, and 42.)

The appellate court in Carter, supra, distilled the following from its review of various statutes and cases: "From the statutes and cases discussed above, we distill several factors that must be present for conduct to constitute neglect within the meaning of the Elder Abuse Act and thereby trigger the enhanced remedies available under the Act. The plaintiff must allege (and ultimately prove by clear and convincing evidence) facts establishing that the defendant: (1) had responsibility for meeting the basic needs of the elder or dependent adult, such as nutrition, hydration, hygiene or medical care (Welf. & Inst.Code, §§ 15610.07, subd. (b), 15610.57, subd. (b); *Delaney, supra,* 20 Cal.4th at p. 34, 82 Cal.Rptr.2d 610, 971 P.2d 986); (2) knew of conditions that made the elder or dependent adult unable to provide for his or her own basic needs (*Sababin, supra,* 144 Cal.App.4th at pp. 85, 90, 50 Cal.Rptr.3d 266; *Benun, supra,* 123 Cal.App.4th at p. 116, 20 Cal.Rptr.3d 26; *Mack, supra,* 80 Cal.App.4th at pp. 972–973, 95 Cal.Rptr.2d 830); and (3) denied or withheld goods or services necessary to meet the elder or dependent adult's basic needs, either with knowledge that injury was

substantially certain to befall the elder or dependent adult (if the plaintiff alleges oppression, fraud or malice) or with conscious disregard of the high probability of such injury (if the plaintiff alleges recklessness) (Welf. & Inst.Code, §§ 15610.07, subd. (b); 15610.57, subd. (b), 15657; *Covenant Care, supra,* 32 Cal.4th at pp. 783, 786, 11 Cal.Rptr.3d 222, 86 P.3d 290; *Delaney,* at pp. 31–32, 82 Cal.Rptr.2d 610, 971 P.2d 986). The plaintiff must also allege (and ultimately prove by clear and convincing evidence) that the neglect caused the elder or dependent adult to suffer physical harm, pain or mental suffering. (Welf. & Inst.Code, §§ 15610.07, subds. (a), (b), 15657; *Perlin, supra,* 163 Cal.App.4th at p. 664, 77 Cal.Rptr.3d 743; *Berkley, supra,* 152 Cal.App.4th at p. 529, 61 Cal.Rptr.3d 304.) Finally, the facts constituting the neglect and establishing the causal link between the neglect and the injury "must be pleaded with particularity," in accordance with the pleading rules governing statutory claims. (*Covenant Care,* at p. 790, 11 Cal.Rptr.3d 222, 86 P.3d 290.)" (Carter v. Prime Healthcare Paradise Valley LLC (2011) 198 Cal.App.4th 396, 406–407.)

The appellate court in Fenimore v. Regents of University of California (2016) 245 Cal.App.4th 1339 reversed the trial court's sustaining of a demurrer to the elder abuse by neglect cause of action by stating with regards to the sufficiency of the allegations of reckless conduct: "The FAC supplied allegations that may show recklessness. It alleged the Hospital had a pattern and knowing practice of improperly understaffing to cut costs, and had the Hospital been staffed sufficiently, George would have been properly supervised and would not have suffered injury. On a demurrer, we must accept the allegations as true and express no opinion on whether the Fenimores can ultimately prove these allegations. We must assume the Fenimores can prove by clear and convincing evidence that the Hospital was understaffed at the time George fell, that this understaffing caused George to fall or otherwise harmed him, and that this understaffing was part of a pattern and practice. If they do so, we cannot say as a

matter of law that the Hospital should escape liability for reckless neglect. The trier of fact should decide whether a knowing pattern and practice of understaffing in violation of applicable regulations amounts to recklessness." (Fenimore v. Regents of University of California (2016) 245 Cal.App.4th 1339, 1349.)

The appellate court in Fenimore, supra, further stated: "By way of analogy, here, if a jury were to find the Hospital knew of the staffing regulations, violated them, and had a significant pattern of doing so, it could infer recklessness, i.e., a " 'conscious choice of a course of action ... with knowledge of the serious danger to others involved in it.' " (*Delaney, supra,* 20 Cal.4th at pp. 31–32, 82 Cal.Rptr.2d 610, 971 P.2d 986.) We decline to hold as a matter of law that such conduct does not constitute recklessness. ¶ The trial court relied on *Worsham* to hold the understaffing allegations did not amount to reckless neglect under the Act, but we do not find *Worsham* controlling. In that case, the elder suffered a fall while recovering from hip surgery at a hospital's rehabilitative care unit. (*Worsham, supra,* 226 Cal.App.4th at p. 334, 171 Cal.Rptr.3d 667.) The plaintiff alleged the hospital knew the elder was a fall risk; the hospital was "chronically understaffed" and undertrained the staff it did have; and the lack of sufficiently well-trained staff caused the decedent's fall. (*Id.* at pp. 334, 338, 171 Cal.Rptr.3d 667.) The trial court sustained the hospital's demurrer to the operative complaint, holding that, although the plaintiff alleged the hospital acted recklessly by deliberately understaffing and undertraining, he had not sufficiently supported the allegations with particular facts. (*Id.* at p. 335, 171 Cal.Rptr.3d 667.) The appellate court affirmed and held the allegations of failure to provide adequate staffing constituted nothing more than "negligence in the undertaking of medical services, not a 'fundamental "[f]ailure to *provide* medical care for physical and mental health needs." ' " (*Id.* at p. 338, 171 Cal.Rptr.3d 667, quoting *Delaney, supra,* 20 Cal.4th at p. 34, 82 Cal.Rptr.2d 610, 971 P.2d 986.) ¶ *Worsham*'s determination that understaffing constitutes no

more than negligence may be true, *absent* further allegations showing recklessness. But the Fenimores have alleged more than a simple understaffing here. The FAC identified the staffing regulation the Hospital allegedly violated and suggested a knowing pattern of violating it constituted recklessness. A jury may see knowingly flouting staffing regulations as part of a pattern and practice to cut costs, thereby endangering the facility's elderly and dependent patients, as qualitatively different than simple negligence." (Fenimore v. Regents of University of California (2016) 245 Cal.App.4th 1339, 1350.)

As stated earlier, plaintiffs alleged that defendant's pattern of understaffing violated 22 CCR 87411, which provides: "(a) Facility personnel shall at all times be sufficient in numbers, and competent to provide the services necessary to meet resident needs. In facilities licensed for sixteen or more, sufficient support staff shall be employed to ensure provision of personal assistance and care as required in Section 87608, Postural Supports. Additional staff shall be employed as necessary to perform office work, cooking, house cleaning, laundering, and maintenance of buildings, equipment and grounds. The licensing agency may require any facility to provide additional staff whenever it determines through documentation that the needs of the particular residents, the extent of services provided, or the physical arrangements of the facility require such additional staff for the provision of adequate services." (22 CCR § 87411(a).)

Plaintiffs also alleged that defendants violated 22 CFR § 87464.

"(b) As used in this chapter, basic services are those services required to be provided in order to obtain and maintain a license." (22 CFR § 87464(b).)

"(f) Basic services shall at a minimum include: ¶ (1) Care and supervision as defined in Section 87101(c)(3) and Health and Safety Code section 1569.2(c). ¶ (2) Safe and healthful living accommodations and services, as specified in Section 87307, Personal Accommodations

and Services. ¶ (3) Three nutritionally well-balanced meals and snacks made available daily, including low salt or other modified diets prescribed by a doctor as a medical necessity, as specified in Section 87555, General Food Service Requirements. ¶ (4) Personal assistance and care as needed by the resident and as indicated in the pre-admission appraisal, with those activities of daily living such as dressing, eating, bathing, and assistance with taking prescribed medications, as specified in Section 87608, Postural Supports. ¶ (5) Regular observation of the resident's physical and mental condition, as specified in Section 87466, Observation of the Resident. ¶ (6) Arrangements to meet health needs, including arranging transportation, as specified in Section 87465, Incidental Medical and Dental Care Services. ¶ (7) A planned activities program which includes social and recreational activities appropriate to the interests and capabilities of the resident, as specified in Section 87219, Planned Activities." (22 CFR § 87464(f).)

Under the totality of the circumstances alleged, plaintiffs have adequately alleged with the required particularity that defendants were guilty of reckless neglect in failing to provide food and water to plaintiff's decedent for 2-3 days; failing to provide necessary medical care for the plaintiffs' decedent's physical therapy needs as directed by plaintiffs' decedent's physician after she fractured her wrist and hip until pressured by plaintiffs; failing to prevent malnutrition or dehydration by withholding food and water from plaintiff's decedent for 2-3 days; and failing to protect her from known health and safety hazards through a pattern and practice of intentional understaffing that left plaintiffs' decedent especially vulnerable to multiple falls while not properly assisted and supervised when defendants were well aware of the plaintiffs' susceptibility to falling, which eventually resulted in a displaced fracture of the hip and a wrist fracture that defendants delayed in obtaining needed medical treatment for.

"A demurrer for uncertainty is strictly construed, even where a complaint is in some respects uncertain, because ambiguities can be clarified under modern discovery procedures. (5 Witkin, Cal.Procedure (3d ed. 1985) Pleading, § 927, p. 364; 1 Weil & Brown, Civil Procedure Before Trial (1990) § 7:85, p. 7-23.)" (Khoury v. Maly's of California, Inc. (1993) 14 Cal.App.4th 612, 616.)

"A special demurrer should be overruled where the allegations of the complaint are sufficiently clear to apprise the defendant of the issues which he is to meet. *People v. Lim*, 18 Cal.2d 872, 882, 118 P.2d 472. All that is required of a complaint, even as against a special demurrer, is that it set forth the essential facts of plaintiff's case with reasonable precision and with particularity sufficiently specific to acquaint defendant of the nature, source, and extent of the cause of action. *Smith v. Kern County Land Co.*, 51 Cal.2d 205, 209, 331 P.2d 645. While there are some uncertainties in counts II and III, they are largely matters which lie within the knowledge of defendants. A demurrer does not lie to such matters. *Turner v. Milstein*, 103 Cal.App.2d 651, 658, 230 P.2d 25." (Gressley v. Williams (1961) 193 Cal.App.2d 636, 643-644.)

The special demurrer to the elder abuse by neglect cause of action is overruled as the complaint sets forth the essential facts of plaintiffs' case with reasonable precision and with particularity sufficiently specific to acquaint defendants of the nature, source, and extent of the cause of action.

Financial Elder Abuse Cause of Action

"Among other things, the Elder Abuse Act provides that any person who takes, secretes, appropriates, obtains or retains real or personal property of "an elder"—a person residing in this state who is 65 years or older (see § 15610.27)—for a wrongful use or with the intent to defraud or by undue influence is liable for elder financial abuse. (§ 15610.30, subd. (a); see §§

15657.5 [authorizing action for damages and recovery of enhanced remedies in certain circumstances], 15657.6 [return of property].)" (Tepper v. Wilkins (2017) 10 Cal.App.5th 1198, 1203–1204.)

The Third District Court of Appeal has held: "The substantive law of elder abuse provides that financial abuse of an elder occurs when any person or entity takes, secretes, appropriates, or retains real or personal property of an elder adult to a wrongful use or with an intent to defraud, or both. A wrongful use is defined as taking, secreting, appropriating, or retaining property in bad faith. Bad faith occurs where the person or entity knew or should have known that the elder had the right to have the property transferred or made readily available to the elder or to his or her representative. (Welf. & Inst.Code, § 15610.30.)" (Teselle v. McLoughlin (2009) 173 Cal.App.4th 156, 174.)

"(a) "Financial abuse" of an elder or dependent adult occurs when a person or entity does any of the following: (1) Takes, secretes, appropriates, obtains, or retains real or personal property of an elder or dependent adult for a wrongful use or with intent to defraud, or both. ¶ (2) Assists in taking, secreting, appropriating, obtaining, or retaining real or personal property of an elder or dependent adult for a wrongful use or with intent to defraud, or both. ¶ (3) Takes, secretes, appropriates, obtains, or retains, or assists in taking, secreting, appropriating, obtaining, or retaining, real or personal property of an elder or dependent adult by undue influence, as defined in Section 15610.70." (Welfare & Institutions Code, § 15610.30(a).)

"(b) A person or entity shall be deemed to have taken, secreted, appropriated, obtained, or retained property for a wrongful use if, among other things, the person or entity takes, secretes, appropriates, obtains, or retains the property and the person or entity knew or should have known that this conduct is likely to be harmful to the elder or dependent adult." (Welfare & Institutions Code, § 15610.30(b).)

"(c) For purposes of this section, a person or entity takes, secretes, appropriates, obtains, or retains real or personal property when an elder or dependent adult is deprived of any property right, including by means of an agreement, donative transfer, or testamentary bequest, regardless of whether the property is held directly or by a representative of an elder or dependent adult." (Welfare & Institutions Code, § 15610.30(c).)

"Plaintiffs correctly point out that bad faith or intent to defraud is no longer required in elder or dependent adult abuse cases. (See *Bonfigli v. Strachan* (2011) 192 Cal.App.4th 1302, 1315–1316, 122 Cal.Rptr.3d 447.) But they still must allege at least a "wrongful use" of property. (Welf. & Inst.Code, § 15610.30, subd. (a)(1).)" (Stebley v. Litton Loan Servicing, LLP (2011) 202 Cal.App.4th 522, 527–528.)

"The Elder Abuse and Dependent Adult Civil Protection Act (Welf. & Inst.Code, § 15600 et seq.) was enacted to provide for the "private, civil enforcement of laws against elder abuse and neglect" (*Delaney v. Baker* (1999) 20 Cal.4th 23, 33, 82 Cal.Rptr.2d 610, 971 P.2d 986). The statutory provisions are not limited to mentally incompetent or physically impaired elders, or persons of limited financial means. (Welf. & Inst.Code, §§ 15600, 15610.27, 15610.30.) Under the statute, it is not necessary that the taker maintain an intent to defraud if it can be shown that the person took the property for a wrongful use and "knew or should have known that [his or her] conduct is likely to be harmful to the elder...." (*Id.,* § 15610.30, subd. (b).) [FN 9.] ¶ FN 9. Subdivision (b) of section 15610.30 of the Welfare and Institutions Code provides: "A person or entity shall be deemed to have taken, secreted, appropriated, obtained, or retained property for a wrongful use if, among other things, the person or entity takes, secretes, appropriates, obtains, or retains the property and *the person or entity knew or should have known that this conduct is likely to be harmful to the elder or dependent adult.*" (Italics added; see also CACI No. 3100.)" (Bonfigli v. Strachan (2011) 192 Cal.App.4th 1302, 1315.)

The "taken for wrongful use" element of an elder or dependent adult financial abuse cause of action must allege something more than a mere breach of contract cause of action for the breach of contract to provide a basis for finding the breach was a wrongful use. The complaint must allege facts to establish that in breaching the contract, the defendant knew or should have known that this conduct is likely to be harmful to the elder or dependent adult. ""We begin by observing that to establish a "wrongful use" of property to which an elder has a contract right, the elder must demonstrate a breach of the contract, or other improper conduct. In *Stebley v. Litton Loan Servicing, LLP* (2011) 202 Cal.App.4th 522, 134 Cal.Rptr.3d 604, the trial court sustained a demurrer without leave to amend to the plaintiffs' complaint, which asserted a claim for wrongful foreclosure and a claim for elder abuse based on the foreclosure. (*Id*. at pp. 524–525, 134 Cal.Rptr.3d 604.) After affirming the ruling with respect to the wrongful foreclosure claim, the appellate court held that the elder abuse claim also failed, concluding that a lender does not engage in financial abuse of an elder by properly exercising its rights under a contract, even though that conduct is financially disadvantageous to an elder. (*Id*. at pp. 527–528, 134 Cal.Rptr.3d 604.) ¶ Subdivision (b) of 15610.30 imposes an additional requirement beyond the existence of improper conduct, namely, that "the person or entity *knew or should have known* that this conduct is likely to be harmful to the elder ... adult." (Italics added.) In statutes and other legal contexts, the italicized phrase ordinarily conveys a requirement for actual or constructive knowledge. (See e.g., *Castillo v. Toll Bros., Inc.* (2011) 197 Cal.App.4th 1172, 1196, 130 Cal.Rptr.3d 150 [Labor Code section 2810, subdivision (a), which bars a person from entering into enumerated contracts when the person " 'knows or should know' " that specified contract condition is absent, imposes requirement for actual or constructive knowledge].) Generally, constructive knowledge, "means knowledge 'that one using reasonable care or diligence should have, and therefore is attributed by law to a given

person' [citation] [, and] encompasses a variety of mental states, ranging from one who is deliberately indifferent in the face of an unjustifiably high risk of harm [citation] to one who merely should know of a dangerous condition [citation]." (*John B. v. Superior Court* (2006) 38 Cal.4th 1177, 1190–1191, 45 Cal.Rptr.3d 316, 137 P.3d 153, quoting Black's Law Dict. (7th ed. 1999) p. 876.) The existence of constructive knowledge is assessed by reference to an objective "reasonable person" measure, "since there is no other way to measure it." (*New v. Consolidated Rock Products Co.* (1985) 171 Cal.App.3d 681, 690, 217 Cal.Rptr. 522.) ¶ Here, our focus is on the deprivation of property due an elder under a contract. In that context, the italicized phrase imposes a requirement in addition to the mere breach of the contract term relating to the property, as the existence of such a breach ordinarily does not hinge on the state of mind or objective reasonableness of the breaching party's conduct. (See *Carma Developers (Cal.), Inc. v. Marathon Development California, Inc.* (1992) 2 Cal.4th 342, 373, 6 Cal.Rptr.2d 467, 826 P.2d 710.) In view of the italicized phrase, we conclude that under subdivision (b) of 15610.30, wrongful conduct occurs only when the party who violates the contract actually knows that it is engaging in a harmful breach, or reasonably should be aware of the harmful breach. [FN 15.] ¶ FN 15. Our conclusion receives additional support from the legislative history of the current version of section 15610.30, the pertinent provisions of which were enacted in 2008. (Stats. 2008, ch. 475, § 1, pp. 3364–3365.) The previous version of the statute stated in pertinent part: "(b) A person or entity shall be deemed to have ... retained property for a wrongful use if, among other things, the person or entity ... retains possession of property in bad faith. [¶] (1) A person or entity shall be deemed to have acted in bad faith if the person or entity knew or should have known that the elder ... had the right to have the property transferred or made readily available...." The legislative analyses accompanying the 2008 legislation reflect an intent to shift the proof required for "wrongful conduct" to "the defendant's

knowledge or presumed knowledge of the effect of the taking on the elder, ... to which a reasonable person standard may be applied." (Sen. Jud. Com., Financial Abuse of Elder or Dependent Adults, March 25, 2008, p. 9 [discussing S.B. 1140 (2007–2008 Reg. Sess.)]; Assem. Com. on Judiciary, Elder and Dependent Adults: Financial Abuse, June 17, 2008, p. 5 [discussing S.B. 1140 (2007–2008 Reg. Sess.)].) In our view, the legislative history does not demonstrate an intent to deem mere breaches of contract actionable instances of elder abuse." (Emphasis added.) (Paslay v. State Farm General Ins. Co. (2016) 248 Cal.App.4th 639 [248 Cal.App.4th 639, 657–658.)

Paragraph 84 of the complaint incorporates by reference all prior allegations into the financial elder abuse cause of action. The complaint further alleges: defendants target dependent adults, dementia suffers and the elderly population and take and obtain payment for services; defendants made false and misleading statements of the care and services they provide in order to get dependent, memory care, and/or elderly residents to pay defendants' high fees; throughout plaintiffs' decedent's stay at the subject facility defendants obtained thousands of dollars of plaintiffs' decedent's money for services defendants did not provide; defendants regularly and incrementally increased her monthly care costs, but failed to provide the promised level of care; in exchange for her money, defendants promised she would be provided with specialty memory care, a home that was safe and secure, she would be provided with adequate supervision and necessary services, and would provide her with services to maintain her health and dignity and protect her from falling; defendant represented they provided adequate staffing numbers and sufficiently trained staff; each of the promises were false and fraudulent and at the time they were made defendants knew or should have known they were false and fraudulent; defendant consciously and continually failed to provide even the most basic level of care when they failed to provide adequate numbers of trained staff at

the facility and adequate monitoring an assessment that resulted in harm to plaintiff; defendants knew they were unable to provide the promised level of care due to insufficient staffing or insufficient training of staff to meet the high acuity needs of the residents; defendants fraudulently induced plaintiffs' decedent to pay money by means of false promises of services they did not provide and could not provide; defendants knew or should have known that defendants' failure to deliver on these promises would cause harm to plaintiffs' decedent; and defendants' conduct was a substantial factor in causing plaintiffs' decedent's harm, including the loss of money paid to defendants for her care, physical injuries, deprivation of food and water leading to hospitalization, loss of dignity, and physical and emotional distress. (Complaint, paragraphs 85-92.)

Under the totality of the circumstances alleged, plaintiffs have adequately alleged with the required particularity that defendants were guilty of financial elder abuse by wrongfully taking, appropriating, or obtaining the elder decedent's money for services not rendered for a wrongful use when defendants knew or should have known that this conduct is likely to be harmful to the elder or dependent adult.

The financial elder abuse cause of action of the complaint sets forth the essential facts of plaintiffs' case with reasonable precision and with particularity sufficiently specific to acquaint defendants of the nature, source, and extent of the cause of action.

The demurrer to the financial elder abuse cause of action is overruled.

Negligence/Negligence Per Se Cause of Action

"The complaint in an action for damages for negligent injury to person or property must allege (1) defendant's legal duty of care toward plaintiff, (2) defendant's breach of duty (the negligent act or omission), (3) injury to plaintiff as a result of the breach (proximate or legal cause); and (4) damage to plaintiff. (4 Witkin, Cal.Procedure (3d ed. 1985), Pleading, § 527, p.

558.) ¶ 'Although the legal conclusion that "a duty" exists is neither necessary nor proper in a complaint, facts which cause it to arise (or from which it is "inferred") are essential to the cause of action.' (Id. at § 531, p. 565.) A complaint which lacks facts to show that a duty of care was owed is fatally defective. (*Peter W. v. San Francisco Unified School Dist.* (1976) 60 Cal.App.3d 814, 821, 131 Cal.Rptr. 854.)" (Wise v. Superior Court (1990) 222 Cal.App.3d 1008, 1013.)

"The failure of a person to exercise due care is presumed if: ¶ (1) He violated a statute, ordinance, or regulation of a public entity; ¶ (2) The violation proximately caused death or injury to person or property; ¶ (3) The death or injury resulted from an occurrence of the nature which the statute, ordinance, or regulation was designed to prevent; and ¶ (4) The person suffering the death or the injury to his person or property was one of the class of persons for whose protection the statute, ordinance, or regulation was adopted." (Evidence Code, § 669(a).)

""Negligence per se" is an evidentiary doctrine codified at Evidence Code section 669. Under subdivision (a) of this section, the doctrine creates a presumption of negligence if four elements are established: (1) the defendant violated a statute, ordinance, or regulation of a public entity; (2) the violation proximately caused death or injury to person or property; (3) the death or injury resulted from an occurrence the nature of which the statute, ordinance, or regulation was designed to prevent; and (4) the person suffering the death or the injury to his person or property was one of the class of persons for whose protection the statute, ordinance, or regulation was adopted. (*Spates v. Dameron Hosp. Assn.* (2003) 114 Cal.App.4th 208, 218, 7 Cal.Rptr.3d 597.) These latter two elements are determined by the court as a matter of law. (*Galvez v. Frields* (2001) 88 Cal.App.4th 1410, 1420, 107 Cal.Rptr.2d 50.) ¶ If the presumption of negligence is established under subdivision (a) of Evidence Code section 669, it may be rebutted under subdivision (b) by proof that "(1) [t]he person violating the statute, ordinance or regulation did what might reasonably be expected of a person of ordinary

prudence, acting under similar circumstances, who desired to comply with the law; or [¶] (2)[t]he person violating the statute, ordinance, or regulation was a child and exercised the degree of care ordinarily exercised by persons of his maturity, intelligence, and capacity under similar circumstances, but the presumption may not be rebutted by such proof if the violation occurred in the course of an activity normally engaged in only by adults and requiring adult qualifications." (Evid.Code, § 669, subd. (b).) ¶ Thus, the doctrine of negligence per se does not establish tort liability. Rather, it merely codifies the rule that a presumption of negligence arises from the violation of a statute which was enacted to protect a class of persons of which the plaintiff is a member against the type of harm that the plaintiff suffered as a result of the violation. (*Peart v. Ferro* (2004) 119 Cal.App.4th 60, 80, fn. 11, 13 Cal.Rptr.3d 885.) Even if the four requirements of Evidence Code section 669, subdivision (a), are satisfied, this alone does not entitle a plaintiff to a presumption of negligence *in the absence of an underlying negligence action.* (*California Service Station etc. Assn. v. American Home Assurance Co.* (1998) 62 Cal.App.4th 1166, 1177–1178, 73 Cal.Rptr.2d 182; *Rosales v. City of Los Angeles* (2000) 82 Cal.App.4th 419, 429–430, 98 Cal.Rptr.2d 144.) ¶ Accordingly, to apply negligence per se is not to state an independent cause of action. The doctrine does not provide a private right of action for violation of a statute. (*Sierra–Bay Fed. Land Bank Assn. v. Superior Court* (1991) 227 Cal.App.3d 318, 333–334, 277 Cal.Rptr. 753.) Instead, it operates to establish a presumption of negligence for which the statute serves the subsidiary function of providing evidence of an element of a preexisting common law cause of action. (*Crusader Ins. Co. v. Scottsdale Ins. Co.* (1997) 54 Cal.App.4th 121, 125, 62 Cal.Rptr.2d 620.) ¶ That the doctrine of negligence per se is an evidentiary presumption rather than an independent right of action demonstrates the fallacy of appellant's contention. The trial court's striking of the elder abuse allegations from her pleading did not deprive her of the ability to pursue any particular cause of

action by proof of negligence per se. Simply put, the doctrine of negligence per se did not furnish appellant with an independent claim or basis of liability of which the trial court's action deprived her. Therefore, there is no merit to her claim of error." (Quiroz v. Seventh Ave. Center (2006) 140 Cal.App.4th 1256, 1285–1286.)

Paragraph 47 of the complaint incorporates by reference into the negligence/negligence per se cause of action all prior allegations of the complaint. The negligence/negligence per se cause of action also alleges: defendants were care custodians as defined in Health and Safety Code, § 15610.17 who were operating a residential care facility for the elderly as defined in 22 CCR § 87101(r)(5); defendants were charged with the care and custody of plaintiff's decedent; defendants were required to follow the regulations designed to protect the elderly and disabled residents of the subject facility from unnecessary injury and risk of harm; defendants breached their duties by leavening plaintiffs' decedent unsupervised and unmonitored, resulting in multiple falls and serious injuries of a fracture wrist and fracture hip and plaintiff's decedent becoming severely dehydrated, contracting a urinary tract infection and being hospitalized after being left in her room unsupervised for 2-3 days without food or water; defendants' conduct violated various enumerated provisions regulating Residential Care Facilities for the Elderly set forth in Title 22, Chapter 8 of the California Code of Regulations; and as of result of defendants' conduct in breach of their duties, plaintiff's decedent sustained physical injuries, pain, suffering, death and incurred medical expenses and other special damages. (Complaint, paragraphs 48-51 and 53-55.)

Under the totality of the circumstances alleged, plaintiffs have adequately alleged a cause of action for negligence/negligence per se against defendants' for damages for the injuries sustained by plaintiffs' decedent because of defendants' negligent conduct and violations of regulations.

The negligence/negligence per se cause of action of the complaint sets forth the essential facts of plaintiffs' case with reasonable precision and with particularity sufficiently specific to acquaint defendants of the nature, source, and extent of the cause of action.

The demurrer to the negligence/negligence per se cause of action is overruled.

Violation of the Patient's Bill of Rights Cause of Action

Defendant argues that this cause of action is premised upon a violation of statute, which must be pled with particularity; and while residents of care facilities for the elderly may bring an action against a licensee of a facility pursuant to Health and Safety Code, § 1569.269 for violation of any rights of the resident or patient set forth in 22 CCR 87468 or any other right provided by federal or state law or regulation, the allegations in the complaint concerning this cause of action are pure conclusions of law as they are not supported by allegations of particular facts to support those conclusions of violation of the patient bill of rights.

Plaintiffs oppose the demurrer to the violation of patient's bill of rights cause of action on the grounds that the patient rights listed in Health and Safety Code, § 1569.269 and 22 CCR § 87468 enumerate resident rights enforced through a private cause of action; paragraphs 60 and 61 of the complaint adequately alleges the facts that support such a cause of action; and pursuant to the provisions of Business and Professions Code, § 17200, et seq, plaintiffs are entitled to restitution from defendants and injunctive relief.

"(a) Residents of residential care facilities for the elderly shall have all of the following rights: ¶ (1) To be accorded dignity in their personal relationships with staff, residents, and other persons. ¶ (2) To be granted a reasonable level of personal privacy in accommodations, medical treatment, personal care and assistance, visits, communications, telephone conversations, use of the Internet, and meetings of resident and family groups. ¶ (3) To confidential treatment of their records and personal information and to approve their release,

except as authorized by law. ¶ (4) To be encouraged and assisted in exercising their rights as citizens and as residents of the facility. Residents shall be free from interference, coercion, discrimination, and retaliation in exercising their rights. ¶ (5) To be accorded safe, healthful, and comfortable accommodations, furnishings, and equipment. ¶ (6) To care, supervision, and services that meet their individual needs and are delivered by staff that are sufficient in numbers, qualifications, and competency to meet their needs. ¶ (7) To be served food of the quality and in the quantity necessary to meet their nutritional needs. ¶ (8) To make choices concerning their daily life in the facility. (9) To fully participate in planning their care, including the right to attend and participate in meetings or communications regarding the care and services to be provided in accordance with Section 1569.80, and to involve persons of their choice in the planning process. The licensee shall provide necessary information and support to ensure that residents direct the process to the maximum extent possible, and are enabled to make informed decisions and choices. ¶ (10) To be free from neglect, financial exploitation, involuntary seclusion, punishment, humiliation, intimidation, and verbal, mental, physical, or sexual abuse. (11) To present grievances and recommend changes in policies, procedures, and services to the staff of the facility, the facility's management and governing authority, and to any other person without restraint, coercion, discrimination, reprisal, or other retaliatory actions. The licensee shall take prompt actions to respond to residents' grievances. ¶ (12) To contact the State Department of Social Services, the long-term care ombudsman, or both, regarding grievances against the licensee. The licensee shall post the telephone numbers and addresses for the local offices of the State Department of Social Services and ombudsman program, in accordance with Section 9718 of the Welfare and Institutions Code, conspicuously in the facility foyer, lobby, residents' activity room, or other location easily accessible to residents. ¶ (13) To be fully informed, as evidenced by the resident's written

acknowledgement, prior to or at the time of admission, of all rules governing residents' conduct and responsibilities. In accordance with Section 1569.885, all rules established by a licensee shall be reasonable and shall not violate any rights set forth in this chapter or in other applicable laws or regulations. ¶ (14) To receive in the admission agreement a comprehensive description of the method for evaluating residents' service needs and the fee schedule for the items and services provided, and to receive written notice of any rate increases pursuant to Sections 1569.655 and 1569.884. ¶ (15) To be informed in writing at or before the time of admission of any resident retention limitations set by the state or licensee, including any limitations or restrictions on the licensee's ability to meet residents' needs. ¶ (16) To reasonable accommodation of individual needs and preferences in all aspects of life in the facility, except when the health or safety of the individual or other residents would be endangered. ¶ (17) To reasonable accommodation of resident preferences concerning room and roommate choices. ¶ (18) To written notice of any room changes at least 30 days in advance unless the request for a change is agreed to by the resident, required to fill a vacant bed, or necessary due to an emergency. ¶ (19) To share a room with the resident's spouse, domestic partner, or a person of resident's choice when both spouses, partners, or residents live in the same facility and consent to the arrangement. ¶ (20) To select their own physicians, pharmacies, privately paid personal assistants, hospice agency, and health care providers, in a manner that is consistent with the resident's contract of admission or other rules of the facility, and in accordance with this act. (21) To have prompt access to review all of their records and to purchase photocopies. Photocopied records shall be promptly provided, not to exceed two business days, at a cost not to exceed the community standard for photocopies. ¶ (22) To be protected from involuntary transfers, discharges, and evictions in violation of state laws and regulations. Facilities shall not involuntarily transfer or evict residents for grounds other than

those specifically enumerated under state law or regulations, and shall comply with enumerated eviction and relocation protections for residents. For purposes of this paragraph, "involuntary" means a transfer, discharge, or eviction that is initiated by the licensee, not by the resident. ¶ (23) To move from a facility. ¶ (24) To consent to have relatives and other individuals of the resident's choosing visit during reasonable hours, privately and without prior notice. ¶ (25) To receive written information on the right to establish an advanced health care directive and, pursuant to Section 1569.156, the licensee's written policies on honoring those directives. ¶ (26) To be encouraged to maintain and develop their fullest potential for independent living through participation in activities that are designed and implemented for this purpose, in accordance with Section 87219 of Title 22 of the California Code of Regulations. ¶ (27) To organize and participate in a resident council that is established pursuant to Section 1569.157. ¶ (28) To protection of their property from theft or loss in accordance with Sections 1569.152, 1569.153, and 1569.154. ¶ (29) To manage their financial affairs. A licensee shall not require residents to deposit their personal funds with the licensee. Except as provided in approved continuing care agreements, a licensee, or a spouse, domestic partner, relative, or employee of a licensee, shall not do any of the following: ¶ (A) Accept appointment as a guardian or conservator of the person or estate of a resident. ¶ (B) Become or act as a representative payee for any payments made to a resident, without the written and documented consent of the resident or the resident's representative. (C) Serve as an agent for a resident under any general or special power of attorney. (D) Become or act as a joint tenant on any account with a resident. ¶ (E) Enter into a loan or promissory agreement or otherwise borrow money from a resident without a notarized written agreement outlining the terms of the repayment being given to the resident. ¶ (30) To keep, have access to, and use their own personal possessions, including toilet articles, and to keep and be allowed to spend their own

money, unless limited by statute or regulation. ¶ (b) A licensed residential care facility for the elderly shall not discriminate against a person seeking admission or a resident based on sex, race, color, religion, national origin, marital status, registered domestic partner status, ancestry, actual or perceived sexual orientation, or actual or perceived gender identity. ¶ (c) No provision of a contract of admission, including all documents that a resident or his or her representative is required to sign as part of the contract for, or as a condition of, admission to a residential care facility for the elderly, shall require that a resident waive benefits or rights to which he or she is entitled under this chapter or provided by federal or other state law or regulation. ¶ (d) Residents' family members, friends, and representatives have the right to organize and participate in a family council that is established pursuant to Section 1569.158. ¶ (e) The rights specified in this section shall be in addition to any other rights provided by law. ¶ (f) The provisions of this section are severable. If any provision of this section or its application is held invalid, that invalidity shall not affect other provisions or applications that can be given effect without the invalid provision or application." (Health & Safety Code, § 1569.269.)

"(a) Residents in residential care facilities for the elderly shall have personal rights which include, but are not limited to, those listed in Sections 87468.1, Personal Rights of Residents in All Facilities, and 87468.2, Additional Personal Rights of Residents in Privately Operated Facilities, as applicable to the facility. ¶ (1) "Privately operated facility" means a residential care facility for the elderly that is licensed to an individual, firm, partnership, association, or corporation. ¶ (2) "Publicly operated facility" means a residential care facility for the elderly that is licensed to a city, county, or other government entity. ¶ (b) At the time the admission agreement is signed, a resident and the resident's representative shall be personally advised of and given a copy of: ¶ (1) The personal rights of residents specified in Sections 87468.1, Personal Rights of Residents in All Facilities and 87468.2, Additional Personal Rights of

Residents in Privately Operated Facilities, as applicable to the facility. ¶ (A) The licensee shall have each resident and the resident's representative sign a copy of these rights, and the signed copy shall be included in the resident's record. ¶ (2) A nondiscrimination notice. ¶ (A) The notice shall read "[Name of facility] does not discriminate and does not permit discrimination, including, but not limited to, bullying, abuse, or harassment, on the basis of actual or perceived sexual orientation, gender identity, gender expression, or HIV status, or based on association with another individual on account of that individual's actual or perceived sexual orientation, gender identity, gender expression, or HIV status. You may file a complaint with the Office of the State Long-Term Care Ombudsman [provide contact information] if you believe that you have experienced this kind of discrimination." ¶ (B) The licensee shall have each resident and the resident's representative sign a copy of this notice, and the signed copy shall be included in the resident's record. ¶ (c) Licensees shall prominently post personal rights, nondiscrimination notice, and complaint information in areas accessible to residents, representatives, and the public. ¶ (1) The personal rights of residents specified in Sections 87468.1, Personal Rights of Residents in All Facilities and 87468.2, Additional Personal Rights of Residents in Privately Operated Facilities shall be posted as applicable to the facility. ¶ (2) Information on the appropriate reporting agency in case of a complaint or emergency, including procedures for filing confidential complaints, shall be posted as follows: ¶ (A) Licensees may use the Residential Care Facility for the Elderly (RCFE) Complaint Poster (PUB 475) or may develop their own poster as provided in this section. A poster developed by the licensee shall contain the same content as the PUB 475. The poster that is posted shall be 20" x 26" in size and be posted in the main entryway of the facility. PUB 475 may be accessed, downloaded, and printed from the www.ccld.ca.gov website. ¶ (d) Licensees shall post the personal rights, nondiscrimination notice, and complaint information specified above in English, and, in any

other language in which at least five (5) percent of the residents can only read that other language. ¶ (e) At the request of the Department, and immediately if the request is made during an inspection, a licensee shall provide the Department with a confidential list of residents that includes the language(s) read by each resident, which is to be kept confidential to the extent permitted by law. This list shall be maintained in an accurate and current status at all times." (22 CCR § 87468.)

"Because recovery is based on a statutory cause of action, the plaintiff must set forth facts in his complaint sufficiently detailed and specific to support an inference that each of the statutory elements of liability is satisfied. General allegations are regarded as inadequate. (*Susman v. City of Los Angeles* (1969) 269 Cal.App.2d 803, 809 [75 Cal.Rptr. 240]; *Vedder v. County of Imperial* (1974) 36 Cal.App.3d 654, 659 [111 Cal.Rptr. 728]; *County of Ventura v. City of Camarillo* (1978) 80 Cal.App.3d 1019, 1025 [144 Cal.Rptr. 296]; Van Alstyne, Cal. Government Tort Liability (Cont.Ed.Bar 1980) § 3.72.)" (Mittenhuber v. City of Redondo Beach (1983) 142 Cal.App.3d 1, 5.)

Paragraph 57 of the complaint incorporates into the patient's bill of rights cause of action all prior allegations of specific fact in the complaint and further alleges: defendants violated Sections 15692.269(a)(1), (a)(5), (a)(6), (a)(8), (a)(10), and (a)(26); defendants also violated 22 CCR §§ 87568(a)(1) and (a)(2); the plaintiffs' decedent's rights were violated by defendants' failure to provide appropriate services to prevent serious health and safety hazards to plaintiffs' decedent and failed to provide adequate care to meet her needs; in particular, defendants did not ensure that plaintiff's decedent was free from physical abuse and neglect, failed to treat her with dignity and respect, failed to provide a safe environment free from physical and/or mental abuse, neglect, exploitation, and/or danger, failed to accord her dignity in her relationships with staff, residents and others, and failed to provide adequate staffing, supervision, and services

that met her needs; and as a proximate result of these failures, she was left without care or supervision on multiple occasions resulting in her broken hip and wrist; and defendants' failure to provide her basic needs caused her to be left alone in her room for 2-3 days without food or water causing severe dehydration, a UTI, and requiring hospitalization. (Complaint, paragraphs 59-61.)

Under the totality of the specific facts and circumstances alleged in the complaint, including the facts alleged in the complaint prior to the violation of patient's bill of rights cause of action, the court finds that the complaint set forth facts sufficiently detailed and specific to support an inference that each of the statutory elements of liability is satisfied. The demurrer to the violation of patient's bill of rights cause of action is overruled.

Fraud/Misrepresentation/Omission Cause of Action

Defendants demur to the Fraud/Misrepresentation/Omission Cause of Action on the grounds that there are no particular facts alleged as to how, when, where, to whom, and by what means defendants made any false representations to plaintiffs or the California Department of Social Services; defendants do not have any history of complaints and governmental citations for deficient care and parties as suggested by plaintiff as shown by Exhibit X to the declaration of Vanessa Raven in in support of the demurrer and the Department's database, which shows two Class B citations in 2017 and 2018 that were addressed and are outside the statute of limitations period (See Defendants' Memorandum of Points and Authorities in Support of Demurrer, age 14, line 21 to page 15, line 5.); inasmuch as the citation database is public record, any citations could not be concealed; plaintiffs failed to allege what important facts were not disseminated and were unavailable; plaintiffs failed to allege the misrepresentations; plaintiffs failed to allege knowledge of falsity and intent to

defraud; plaintiffs failed to allege justifiable reliance; and any claim for damages is speculative, imaginary, or remote.

Citing the allegations of paragraphs 66-83 of the complaint, plaintiffs argue that they have alleged facts amounting to fraud with the required specificity and to the extent that defendants assert additional specificity is required, those facts are more within defendants' knowledge than plaintiffs and the requirement of specify of pleading is relaxed.

"The elements of the tort of fraudulent misrepresentation are: (1) representation; (2) falsity; (3) knowledge of falsity; (4) intent to deceive; and (5) reliance and resulting damages (causation). (*Younan v. Equifax Inc.* (1980) 111 Cal.App.3d 498, 512, 169 Cal.Rptr. 478; Civ.Code, § 1709.) Moreover, in California, every element of a cause of action for fraud must be alleged both factually and specifically, and the policy of liberal construction of pleadings will not be invoked to sustain a defective complaint. (*Hall v. Department of Adoptions* (1975) 47 Cal.App.3d 898, 904, 121 Cal.Rptr. 223.)" (Cooper v. Equity Gen. Insurance (1990) 219 Cal.App.3d 1252, 1262.)

Negligent misrepresentation is a species of fraud or deceit specifically requiring a positive assertion (Wilson v. Century 21 Great Western Realty (1993) 15 Cal.App.4th 298, 306.) and in alleging negligent misrepresentation against corporate defendants, the plaintiff must allege the names of the persons who made the allegedly fraudulent representations, their authority to speak, to whom they spoke, what they said or wrote, and when it was said or written (See Lazar v. Superior Court (1996) 12 Cal.4th 631, 645.).

A fraudulent concealment cause of action is merely another species of fraud. "…[F]raud or deceit encompasses the suppression of a fact by one who is bound to disclose it, or the suppression of a fact that is contrary to a representation that was made. (*Outboard Marine,* at

p. 37, 124 Cal.Rptr. 852; *McAdams,* at p. 185, 105 Cal.Rptr.3d 704; Civ.Code, § 1710, subd. 3.)" (Collins v. eMachines, Inc. (2011) 202 Cal.App.4th 249, 255.)

"…[E]very element of a cause of action for fraud must be alleged both factually and specifically, and the policy of liberal construction of pleadings will not be invoked to sustain a defective complaint. (*Hall v. Department of Adoptions* (1975) 47 Cal.App.3d 898, 904, 121 Cal.Rptr. 223.)" (Cooper v. Equity Gen. Insurance (1990) 219 Cal.App.3d 1252, 1262.) "This particularity requirement necessitates pleading *facts* which "show how, when, where, to whom, and by what means the representations were tendered." (*Hills Trans. Co. v. Southwest Forest Industries Inc.* (1968) 266 Cal.App.2d 702, 707, 72 Cal.Rptr. 441.)" (Stansfield v. Starkey (1990) 220 Cal.App.3d 59, 73.) "A plaintiff's burden in asserting a fraud claim against a corporate employer is even greater. In such a case, the plaintiff must 'allege the names of the persons who made the allegedly fraudulent representations, their authority to speak, to whom they spoke, what they said or wrote, and when it was said or written.' (*Tarmann v. State Farm Mutual Auto. Ins. Co.* (1991) 2 Cal.App.4th 153, 157, 2 Cal.Rptr.2d 861.)" (Lazar v. Superior Court (1996) 12 Cal.4th 631, 645.)

""Every element of the cause of action for fraud must be alleged in the proper manner and the facts constituting the fraud must be alleged with sufficient specificity to allow defendant to understand fully the nature of the charge made." (*Roberts v. Ball, Hunt, Hart, Brown & Baerwitz, supra,* at p. 109, 128 Cal.Rptr. 901.) ¶ But the rationale for this " 'strict requirement[ ] of pleading' " (*Committee on Children's Television, Inc. v. General Foods Corp., supra,* 35 Cal.3d 197, 216, 197 Cal.Rptr. 783, 673 P.2d 660) is not merely notice to the defendant. " 'The idea seems to be that allegations of fraud involve a serious attack on character, and fairness to the defendant demands that he should receive the fullest possible details of the charge in order to prepare his defense.' " (*Ibid.*) Thus " 'the policy of liberal construction of the pleadings ... will

not ordinarily be invoked to sustain a pleading defective in any material respect.' " (*Ibid.*) ¶ This particularity requirement necessitates pleading *facts* which "show how, when, where, to whom, and by what means the representations were tendered." (*Hills Trans. Co. v. Southwest Forest Industries Inc.* (1968) 266 Cal.App.2d 702, 707, 72 Cal.Rptr. 441.)" (Stansfield v. Starkey (1990) 220 Cal.App.3d 59, 73.)

"Intent, like knowledge (supra, § 723), is a fact. Hence, the averment that the representation was made with the intent to deceive the plaintiff, or any other general allegation with similar purport, is sufficient. In an early case against directors who had sold property of a corporation for a fraction of its value, plaintiff alleged that the sale was made "knowingly, and for the purposes of defrauding the other stockholders." *Held,* this was sufficient. "The fraudulent intent or purpose, therefore, is one of the facts constituting actual fraud. And we think that an allegation of such fact in terms is sufficient. No amount of circumlocution or amplification can convey the meaning better than to say that a transfer by the directors of a corporation for one tenth of the value of the property was for the purpose or with the intent of defrauding the stockholders. It may be necessary to add other facts. But so far as this fact is concerned, the mode of statement is sufficient. All that the code requires is to state the facts in ordinary and concise language." (*Woodroof v. Howes* (1891) 88 C. 184, 190, 26 P. 111.) (See *Hall v. Mitchell* (1922) 59 C.A. 743, 749, 211 P. 853 [although pleader need not adopt any particular phraseology, simple and direct averment that representation was made with intent to deceive would remove any uncertainty]; for cases upholding inferential pleading, see *Wennerholm v. Stanford University School of Medicine* (1942) 20 C.2d 713, 716, 128 P.2d 522; *Pepper v. Vedova* (1915) 26 C.A. 406, 408, 147 P. 105 [allegation that representations were "willfully, falsely, fraudulently, and deceitfully made"].)" (5 Witkin, California Procedure (6th ed 2022) Pleading, § 725.)

"The question remains whether, in lieu of a recital of the true facts, a general averment that the representation is false will suffice. If we stress the strict requirement of specific pleading of fraud, it is not; if we regard materiality as an essential element that must appear from the pleading, it is not; but if we merely look to the basic principle of pleading facts and not legal conclusions, there is no reason to condemn a general allegation. Falsity is certainly a fact, and to set forth the representation in specific terms, and then characterize it as false, seems a reasonable and concise method of pleading the ultimate facts. The recital of the true facts would appear to be the pleading of evidentiary matter, for the ultimate fact is merely the falsity of the representation. If, e.g., the plaintiff who pleaded specifically were unable to establish the truth of what he or she alleged to be the true facts, but nevertheless did prove that the representation was untrue in a material respect, the right to recovery could scarcely be denied. On principle, therefore, it should be sufficient to allege falsity in general terms. ¶ Support for this view is found in the cases upholding inferential pleading in the absence of a special demurrer. (See supra, § 714.) The pleader, e.g., sometimes entirely omits the direct allegation of falsity, neither reciting the true facts nor averring that the representation was false. But in pleading the representation he or she alleges that it was falsely and fraudulently made, or in pleading the distinct element of knowledge he or she alleges that the representation was known to the defendant to be false and fraudulent. Either of these allegations is said to be good against a general demurrer because it necessarily implies that the representation was false and fraudulent. (See *McKay v. New York Life Ins. Co.* (1899) 124 C. 270, 273, 56 P. 1112 [allegation of defendant's knowledge of falsity necessarily implies that representations were in fact false]; *Spreckels v. Gorrill* (1907) 152 C. 383, 387, 92 P. 1011 [allegation that representations were made "falsely and fraudulently" implies that they were not true].) In upholding this inferential pleading of the missing element, the court assumes that the only thing

lacking is a general allegation of falsity, for that is all that is supplied by the inference; the knowledge averment does not inferentially or otherwise plead the true facts. ¶ Actions based on a false promise likewise seem consistent with this view. The representation (implied) is that of the intention to perform (supra, § 721); the truth is the lack of that intention. Purely evidentiary matters—usually circumstantial evidence or admissions showing lack of that intention—should not be pleaded. Hence, the only necessary averment is the general statement that the promise was made without the intention to perform it, or that the defendant did not intend to perform it. (*Russ Lumber & Mill Co. v. Muscupiabe Land & Water Co*. (1898) 120 C. 521, 524, 530, 52 P. 995; *Union Flower Market, Ltd. v. Southern Calif. Flower Market* (1938) 10 C.2d 671, 675, 76 P.2d 503; *Manuel v. Calistoga Vineyard Co.* (1936) 17 C.A.2d 377, 380, 61 P.2d 1204; *Tyco Industries v. Superior Court* (1985) 164 C.A.3d 148, 156, 211 C.R. 540.) ¶ The absence of such a general allegation is ordinarily a fatal defect. (*Rheingans v. Smith* (1911) 161 C. 362, 366, 119 P. 494; *Ayers v. Southern Pac. R. Co.* (1916) 173 C. 74, 79, 159 P. 144; *Maynes v. Angeles Mesa Land Co*. (1938) 10 C.2d 587, 589, 76 P.2d 109; *Azarello v. Bessolo* (1927) 87 C.A. 272, 276, 262 P. 66; *Scafidi v. Western Loan & Bldg. Co.* (1946) 72 C.A.2d 550, 558, 165 P.2d 260 ["as a consequence plaintiffs' cause of action is at most one upon a mere nonfraudulent broken promise"]; *Hills Trans. Co. v. Southwest Forest Industries* (1968) 266 C.A.2d 702, 708, 72 C.R. 441; *Tyco Industries v. Superior Court*, supra, 164 C.A.3d 156.)" (Emphasis added.) (5 Witkin, California Procedure (5th ed 2020) Pleading, § 725.)

"Moreover, in pleading a fraud action based on the alleged falsity of a representation or of a promise to perform a future act it is not necessary to allege the circumstantial evidence from which it may be inferred that the representation or promise was false—these are evidentiary matters which give rise to the misrepresentation. The only essential allegation is the general

statement that the representation or promise was false and that the defendant knew it to be false at the time it was made. (3 Witkin, Cal.Procedure (2d ed.) Pleading, s 585, pp. 2222—2224.)" (Universal By-Products, Inc. v. City of Modesto (1974) 43 Cal.App.3d 145, 151.)

"It is settled that a plaintiff, to state a cause of action for deceit based on a misrepresentation, must plead that he or she actually relied on the misrepresentation. (E.g., *Molko v. Holy Spirit Assn., supra,* 46 Cal.3d at p. 1108, 252 Cal.Rptr. 122, 762 P.2d 46; *Seeger v. Odell* (1941) 18 Cal.2d 409, 414, 115 P.2d 977; *Spinks v. Clark* (1905) 147 Cal. 439, 444, 82 P. 45.) The law appears always to have been so in this state. (See, e.g., *Colton v. Stanford* (1890) 82 Cal. 351, 383, 23 P. 16; *Nounnan v. Sutter County Land Co.* (1889) 81 Cal. 1, 6-7, 22 P. 515; *Estep v. Armstrong* (1886) 69 Cal. 536, 538, 11 P. 132; *Snow v. Halstead* (1851) 1 Cal. 359, 361.)" (Mirkin v. Wasserman (1993) 5 Cal.4th 1082, 1088.)

"'[A]ctual reliance occurs when a misrepresentation is " 'an immediate cause of [a plaintiff's] conduct, which alters his legal relations,' " and when, absent such representation,' the plaintiff ' " 'would not, in all reasonable probability, have entered into the contract or other transaction.' " ' " (*Hall v. Time Inc.* (2008) 158 Cal.App.4th 847, 855, fn. 2, 70 Cal.Rptr.3d 466.) To allege actual reliance with the requisite specificity, "[t]he plaintiff must plead that he believed the representations to be true ... and that in reliance thereon (or induced thereby) he entered into the transaction. [Citation.]" (*Younan, supra,* 111 Cal.App.3d at p. 513, 169 Cal.Rptr. 478.)" (Beckwith v. Dahl (2012) 205 Cal.App.4th 1039, 1062-1063.)

In finding the allegations of justifiable reliance were sufficient, an appellate court has stated: "The fraud cause of action alleges Weiner knowingly made false promises Douglas would be paid commissions when Weiner received signed contracts. Douglas also pleads Weiner made these promises to induce Douglas to work for Weiner and that Douglas relied on those promises by entering an employment relationship with Weiner. Douglas also pleads Weiner

failed to pay commissions exceeding $50,000. These allegations are sufficient to state a cause of action for fraud and the demurrer to that cause of action should have been overruled. (See *Winn v. McCulloch Corp.* (1976) 60 Cal.App.3d 663, 670, 131 Cal.Rptr. 597.)" (Douglas v. Superior Court (1989) 215 Cal.App.3d 155, 158-159.)

Paragraph 65 of the complaint incorporates by reference into the Fraud/Misrepresentation/Omission cause of action all prior allegations of the complaint. The Fraud/Misrepresentation/Omission cause of action also alleges: before and after the admissions process the alleged false misrepresentations and omissions were knowingly made with an intent to deceive/induce reliance by plaintiffs and plaintiffs' decedent and which resulted in justifiable reliance; throughout the admissions process various staff, agents, and managers of defendants represented to plaintiffs' decedent and her family that plaintiffs' decedent would be provided assistance with her activities of daily living that she required by a professional care staff, including medication monitoring and management and a 24 hour response system to respond to emergencies and staffing based upon resident acuity; defendants also represented to plaintiffs' decedent and family that the subject facility was more like a medical facility rather than the hotel it turned out to be with little to no supervision; in truth and fact, defendants could not provide the level of series promised and knew they could not provide those services, because defendants intentionally understaffed the facility; defendants also omitted the material facts that defendants knew or should have known would influence plaintiffs' decedent and plaintiffs' decision as to the facility to which they would admit plaintiffs' decedent and where she would remain; even after plaintiff Hoaglund suggested to defendants' staff that plaintiffs' decedent should be moved to a different facility, defendants cautioned against it and told plaintiff that moving her would disorient and confuse plaintiff's decedent due to her dementia; all of these representations and material omissions were intentionally made to

deceive and/or induce reliance by plaintiffs' decedent and her family; the representations did cause plaintiffs' decedent and her family to rely on defendants' representations and plaintiffs' decent suffered monetary damages and injuries as a result of that reliance; defendants advertise on their website that its care has specialty trained and caring staff that provide services as needed and receive on-going training and that their staff provide a minimum of three safety check in a 24 hour period and is always available to assist with activities of daily living; the sole purpose of these claims is to lure residents with the promise of better care, which residents, including plaintiffs' decedent, did not receive; and defendants' facility has a history of complaints and governmental citations relating to deficient care practices and understaffing. (Complaint, paragraphs 66-70.)

Additional facts are alleged in paragraphs 71-82.

The court notes that there is no Exhibit X attached to the declaration of Vanessa Raven filed in support of the demurrer on April 20, 2022. That declaration only has Exhibits A-F attached. In addition, the court sustained the objection to Defendants' Request for Judicial Notice of RJN Exhibit A as it was only a list of 41 visits to the subject facility printed from the Department's website that admittedly does not identify complaint visits and is not designed to set forth a history of complaints against the facility.

Under the totality of the specific facts and circumstances alleged in the complaint, plaintiffs have adequately alleged a fraud based cause of action against defendants stating within their knowledge who made the allegedly fraudulent representations, their authority to speak, to whom they spoke, what they said or wrote, and when it was said or written; falsity of the representations; knowledge of falsity as defendants knew they could not provide the level of services promised, because defendants intentionally understaffed the facility; intent to deceive; reliance; and resulting damages. The demurrer to the fraud cause of action is overruled.

In addition, the fraud cause of action of the complaint sets forth the essential facts of plaintiffs' case with reasonable precision and with particularity sufficiently specific to acquaint defendants of the nature, source, and extent of the cause of action.

To the extent that defendants assert there is insufficient allegations to establish negligent misrepresentation, misrepresentation by omission, or fraudulent misrepresentation to the department of Social Services, the court need not address those issues as defendants can not demur to a portion of a single cause of action and the cause of action states a sufficient fraud cause of action.

The rule is that a general demurrer should be overruled if the pleading, liberally construed, states a cause of action under any theory. (Brousseau v. Jarrett (1977) 73 Cal.App.3d 864, 870-871.)

"A demurrer does not lie to a portion of a cause of action. (Citations Omitted.)" (PH II, Inc. v. Superior Court (1995) 33 Cal.App.4th 1680, 1682.) Where a portion of the cause of action is defective on the face of the complaint, the appropriate remedy is to bring a motion to strike that portion of the complaint. (PH II, Inc., supra at pages 1682-1683.)

"We emphasize that such use of the motion to strike should be cautious and sparing. We have no intention of creating a procedural "line-item veto" for the civil defendant. However, properly used and in the appropriate case, a motion to strike may lie for purposes discussed in this opinion." (PH II, Inc. v. Superior Court (1995) 33 Cal.App.4th 1680, 1683.)

The demurrer to the fraud/misrepresentation/omission cause of action is overruled.

Duplicative Causes of Action Demurrer

Defendants assert that plaintiffs' fraud, financial elder abuse, and unfair business practices causes of action are duplicative causes of action of the negligence and elder abuse by neglect causes of action, which are susceptible to demurrer.

In affirming the trial court's sustaining of a demurrer to a cause of action without leave to amend which duplicated another cause of action in the operative pleading, the Fourth District Court of Appeal stated: "Regardless, as Parth argues, the cause of action for breach of governing documents appears to be duplicative of the cause of action for breach of fiduciary duty. This court has recognized this as a basis for sustaining a demurrer. (See *Rodrigues v. Campbell Industries* (1978) 87 Cal.App.3d 494, 501, 151 Cal.Rptr. 90 [finding demurrer was properly sustained without leave to amend as to cause of action that contained allegations of other causes and "thus add[ed] nothing to the complaint by way of fact or theory of recovery"]; see also *Award Metals, Inc. v. Superior Court* (1991) 228 Cal.App.3d 1128, 1135, 279 Cal.Rptr. 459 [Second Appellate District, Division Four; demurrer should have been sustained as to duplicative causes of action].) [FN 12.] The Association does not address Parth's argument or explain how its document claim differs from the fiduciary breach claim. We conclude that the trial court properly sustained the demurrer. ¶ FN 12. But see *Blickman Turkus, LP v. MF Downtown Sunnyvale, LLC* (2008) 162 Cal.App.4th 858, 890, 76 Cal.Rptr.3d 325 (Sixth Appellate District) (finding that duplication is not grounds for demurrer and that a motion to strike is the proper way to address duplicative material)." (Palm Springs Villas II Homeowners Association, Inc. v. Parth (2016) 248 Cal.App.4th 268, 290.)

The Fourth District recognized in footnote 12 of the Palm Springs Villas II Homeowners Association, Inc. opinion that there was contrary authority in an opinion in the Sixth District Court of Appeal.

The Sixth District Court of Appeal holds that redundancy/duplication of causes of action is not a proper ground of demurrer. The Sixth District held: "Again our task is complicated by the fact that the parties do not join battle over the basic question whether the elements of the cause of action are adequately set forth in the pleading but choose instead to debate questions

we consider secondary, if not peripheral. This problem seems to originate, once again, with BTC's misreading of the cross-complaint. In its demurrer, BTC characterized the third cause of action as resting on its allegedly having "concealed" information "negligently" rather than "intentionally." BTC went on to argue that this was a distinction without legal significance, and that the court should sustain the demurrer because the third cause of action "mirrors [the] first cause of action for concealment and is duplicative." This is not a ground on which a demurrer may be sustained. (See Code Civ. Proc., § 430.10.) A quarter-century ago the code authorized a *motion to strike* "irrelevant and *redundant"* matter from a pleading. (Former Code Civ. Proc., § 453, repealed 1982.) But the parallel provision now empowers the court only to "[s]trike out any irrelevant, false, or improper matter inserted in any pleading." (Code Civ. Proc., § 436, subd. (a).) The elimination of the reference to redundancy may have rested on the irreproachable rationale that it is a waste of time and judicial resources to entertain a motion challenging part of a pleading on the sole ground of repetitiveness. (See Civ.Code, § 3537 ["Superfluity does not vitiate"].) This is the sort of defect that, if it justifies any judicial intervention at all, is ordinarily dealt with most economically at trial, or on a dispositive motion such as summary judgment." (Emphasis added.) (Blickman Turkus, LP v. MF Downtown Sunnyvale, LLC (2008) 162 Cal.App.4th 858, 889–890.)

However, "…a party may plead in the alternative and may make inconsistent allegations. (See, e.g., *Crowley v. Katleman* (1994) 8 Cal.4th 666, 690–691, 34 Cal.Rptr.2d 386, 881 P.2d 1083; *Rader v. Stone* (1986) 178 Cal.App.3d 10, 29, 223 Cal.Rptr. 806; *Skelly v. Richman* (1970) 10 Cal.App.3d 844, 856, 89 Cal.Rptr. 556; 4 Witkin, Cal. Procedure (3d ed. 1985) Pleading, §§ 356–358, pp. 411–414.)" (Adams v. Paul (1995) 11 Cal.4th 583, 593.)

Assuming for the sake of argument only that a duplicative cause of action that is not merely an alternative theory of liability is subject to demurrer, the court will rule on the duplicative cause of action demurrers.

While the negligence, elder abuse by neglect, fraud and financial elder abuse causes of action may have some overlap in the facts that are alleged in the complaint, they are entirely different causes of action in which different elements must be proven, there is a different burden of proof for recovery of enhanced damages in the financial elder abuse causes of action, the measure of damages are potentially different, and there is case authority that holds that elder abuse act causes of action are independent causes of action.

Heightened damages are available in elder abuse causes of action, including recovery of damages for predeath pain, suffering, and disfigurement not otherwise available where the plaintiff has passed way prior to the action being brought.

"When legislators enacted the Elder Abuse Act, they enhanced the potential sanctions for neglect of elders or certain dependent adults. They did so by establishing heightened remedies—allowing not only for a plaintiff's recovery of attorney fees and costs, but also exemption from the damages limitations otherwise imposed by Code of Civil Procedure section 377.34. Unlike other actions brought by a decedent's personal representative or successor in interest, claims under the Act allow for the recovery of damages for predeath pain, suffering, and disfigurement. (Welf. & Inst.Code § 15657.)" (Winn v. Pioneer Medical Group, Inc. (2016) 63 Cal.4th 148, 155.)

"The elements of the tort of fraudulent misrepresentation are: (1) representation; (2) falsity; (3) knowledge of falsity; (4) intent to deceive; and (5) reliance and resulting damages (causation). (*Younan v. Equifax Inc.* (1980) 111 Cal.App.3d 498, 512, 169 Cal.Rptr. 478; Civ.Code, § 1709.)" (Cooper v. Equity Gen. Insurance (1990) 219 Cal.App.3d 1252, 1262.)

Financial elder abuse does not require proof of intent to defraud.

"Among other things, the Elder Abuse Act provides that any person who takes, secretes, appropriates, obtains or retains real or personal property of "an elder"—a person residing in this state who is 65 years or older (see § 15610.27)—for a wrongful use or with the intent to defraud or by undue influence is liable for elder financial abuse. (§ 15610.30, subd. (a); see §§ 15657.5 [authorizing action for damages and recovery of enhanced remedies in certain circumstances], 15657.6 [return of property].)" (Tepper v. Wilkins (2017) 10 Cal.App.5th 1198, 1203–1204.)

"Plaintiffs correctly point out that bad faith or intent to defraud is no longer required in elder or dependent adult abuse cases. (See *Bonfigli v. Strachan* (2011) 192 Cal.App.4th 1302, 1315–1316, 122 Cal.Rptr.3d 447.) But they still must allege at least a "wrongful use" of property. (Welf. & Inst.Code, § 15610.30, subd. (a)(1).)" (Stebley v. Litton Loan Servicing, LLP (2011) 202 Cal.App.4th 522, 527–528.)

""[w]here it is proven by clear and convincing evidence that a defendant is liable for physical abuse as defined in Section 15610.63, neglect as defined in Section 15610.57, or financial abuse as defined in Section 15610.30, and that the defendant has been guilty of recklessness, oppression, fraud, or malice in the commission of this abuse, in addition to all other remedies otherwise provided by law: [¶] (a) The court shall award to the plaintiff reasonable attorney's fees and costs." (§ 15657; *Marron v. Superior Court*, supra, 108 Cal.App.4th at p. 1058, 134 Cal.Rptr.2d 358.)" (Intrieri v. Superior Court (2004) 117 Cal.App.4th 72, 82.)

"Where it is proven by a preponderance of the evidence that a defendant is liable for financial abuse, as defined in Section 15610.30, in addition to compensatory damages and all other remedies otherwise provided by law, the court shall award to the plaintiff reasonable attorney's fees and costs. The term "costs" includes, but is not limited to, reasonable fees for

the services of a conservator, if any, devoted to the litigation of a claim brought under this article." (Welfare and Institutions Code, § 15657.5(a).)

"Where it is proven by a preponderance of the evidence that a defendant is liable for financial abuse, as defined in Section 15610.30, and where it is proven by clear and convincing evidence that the defendant has been guilty of recklessness, oppression, fraud, or malice in the commission of the abuse, in addition to reasonable attorney's fees and costs set forth in subdivision (a), compensatory damages, and all other remedies otherwise provided by law, the limitations imposed by Section 377.34 of the Code of Civil Procedure on the damages recoverable shall not apply." (Welfare and Institutions Code, § 15657.5(b).)

"(b) A person or entity shall be deemed to have taken, secreted, appropriated, obtained, or retained property for a wrongful use if, among other things, the person or entity takes, secretes, appropriates, obtains, or retains the property and the person or entity knew or should have known that this conduct is likely to be harmful to the elder or dependent adult." (Welfare & Institutions Code, § 15610.30(b).)

A negligence/negligence per se cause of action does not require proof of fraud or that a person took, secreted, appropriated, obtained or retained real or personal property of an elder.

"The complaint in an action for damages for negligent injury to person or property must allege (1) defendant's legal duty of care toward plaintiff, (2) defendant's breach of duty (the negligent act or omission), (3) injury to plaintiff as a result of the breach (proximate or legal cause); and (4) damage to plaintiff. (4 Witkin, Cal.Procedure (3d ed. 1985), Pleading, § 527, p. 558.)" (Wise v. Superior Court (1990) 222 Cal.App.3d 1008, 1013.)

""Negligence per se" is an evidentiary doctrine codified at Evidence Code section 669. Under subdivision (a) of this section, the doctrine creates a presumption of negligence if four elements are established: (1) the defendant violated a statute, ordinance, or regulation of a

public entity; (2) the violation proximately caused death or injury to person or property; (3) the death or injury resulted from an occurrence the nature of which the statute, ordinance, or regulation was designed to prevent; and (4) the person suffering the death or the injury to his person or property was one of the class of persons for whose protection the statute, ordinance, or regulation was adopted. (*Spates v. Dameron Hosp. Assn.* (2003) 114 Cal.App.4th 208, 218, 7 Cal.Rptr.3d 597.)" (Quiroz v. Seventh Ave. Center (2006) 140 Cal.App.4th 1256, 1285.)

Elder Abuse by neglect also does not require proof of fraud or that a person took, secreted, appropriated, obtained or retained real or personal property of an elder.

"(a) "Neglect" means either of the following: ¶ (1) The negligent failure of any person having the care or custody of an elder or a dependent adult to exercise that degree of care that a reasonable person in a like position would exercise. ¶ (2) The negligent failure of an elder or dependent adult to exercise that degree of self care that a reasonable person in a like position would exercise." (Welfare & Institutions Code, § 15610.57(a).)

"(b) Neglect includes, but is not limited to, all of the following: ¶ (1) Failure to assist in personal hygiene, or in the provision of food, clothing, or shelter. ¶ (2) Failure to provide medical care for physical and mental health needs. A person shall not be deemed neglected or abused for the sole reason that the person voluntarily relies on treatment by spiritual means through prayer alone in lieu of medical treatment. ¶ (3) Failure to protect from health and safety hazards. ¶ (4) Failure to prevent malnutrition or dehydration. ¶ (5) Substantial inability or failure of an elder or dependent adult to manage their own finances. ¶ (6) Failure of an elder or dependent adult to satisfy any of the needs specified in paragraphs (1) to (5), inclusive, for themselves as a result of poor cognitive functioning, mental limitation, substance abuse, or chronic poor health." (Welfare & Institutions Code, § 15610.57(b).)

Finally, actions for violation of the Elder Abuse Act are independent causes of action.

"The Supreme Court's language in *Barris v. County of Los Angeles, supra,* 20 Cal.4th 101, 83 Cal.Rptr.2d 145, 972 P.2d 966 and *Covenant Care, Inc. v. Superior Court, supra,* 32 Cal.4th 771, 11 Cal.Rptr.3d 222, 86 P.3d 290 is authority for the proposition that the Act creates an independent cause of action. (See *Intrieri v. Superior Court* (2004) 117 Cal.App.4th 72, 82, 12 Cal.Rptr.3d 97 ["The elements of a cause of action under the Elder Abuse Act are statutory ..."]; *Benun v. Superior Court* (2004) 123 Cal.App.4th 113, 119, 20 Cal.Rptr.3d 26 [recognizing "causes of action against health care providers for 'custodial elder abuse' under the Elder Abuse Act"]; *Wolk v. Green* (N.D.Cal.2007) 516 F.Supp.2d 1121, 1133 ["A civil cause of action under the Elder Abuse statute is governed by California Welfare and Institutions Code section 15657 ..."].) It is noteworthy that when the Legislature added Article 8.5 to the Act, of which article section 15657 is a part, it labeled the article, "Civil Actions for Abuse of Elderly or Dependent Adults." (Stats, 1991, c. 774 (SB 679), § 1; see also CACI 3100, Directions For Use (Feb. 2008), p. 284 ["The instructions in this series are not intended to cover every circumstance in which a plaintiff can bring a cause of action under the Elder Abuse and Dependent Adult Civil Protection Act"].) ¶ We reject plaintiffs' argument that a violation of the Act does not constitute an independent cause of action." (Perlin v. Fountain View Management, Inc. (2008) 163 Cal.App.4th 657, 666.)

Therefore, the common law fraud and statutory financial elder abuse causes of action are not duplicative of the negligence and elder abuse by neglect causes of action and not subject to demurrer.

The unfair business practices cause of action admittedly borrows from other laws and the remedies or penalties provided by the unfair business practices act are expressly stated to be cumulative to each other and to the remedies or penalties available under all other laws of this state. (See Business and Professions Code, § 17205.)

"Although the unlawful prong of the UCL borrows from other laws, it is not a substitute for those laws. (*Cortez, supra,* 23 Cal.4th at p. 173, 96 Cal.Rptr.2d 518, 999 P.2d 706.) Section 17205 makes this explicit: "Unless otherwise expressly provided, the remedies or penalties provided by this chapter are cumulative to each other and to the remedies or penalties available under all other laws of this state." In enacting the UCL, "the overarching legislative concern [was] to provide a *streamlined* procedure for the prevention of ongoing or threatened acts of unfair competition." (*Cortez, supra,* 23 Cal.4th at pp. 173–174, 96 Cal.Rptr.2d 518, 999 P.2d 706, quoting *Dean Witter Reynolds, Inc. v. Superior Court* (1989) 211 Cal.App.3d 758, 774, 259 Cal.Rptr. 789.) Consistent with this objective, the UCL provides only for equitable remedies. "Prevailing plaintiffs are generally limited to injunctive relief and restitution." (*Cel–Tech Communications, Inc. v. Los Angeles Cellular Telephone Co.* (1999) 20 Cal.4th 163, 179, 83 Cal.Rptr.2d 548, 973 P.2d 527 (*Cel–Tech*); see also § 17203.) Damages are not available. (*Cel–Tech,* at p. 179, 83 Cal.Rptr.2d 548, 973 P.2d 527; *Cortez,* at p. 178, 96 Cal.Rptr.2d 518, 999 P.2d 706 ["An order that earned wages be paid is therefore a restitutionary remedy authorized by the UCL. The order is not one for payment of damages"].) ¶ Thus, the UCL is not simply a legislative conversion of a legal right into an equitable one. It is a separate equitable cause of action. (*Cruz v. PacifiCare Health Systems, Inc.* (2003) 30 Cal.4th 303, 317, 133 Cal.Rptr.2d 58, 66 P.3d 1157.)" (Hodge v. Superior Court (2006) 145 Cal.App.4th 278, 284.)

The unfair business practices cause of action remedies being cumulative to the fraud and financial elder abuse theories of liability and being a separate equitable cause of action, it is not a duplicative cause of action subject to demurrer.

The duplicative cause of action demurrer is overruled.

Wrongful Death Cause of Action

Defendants argue that since the elder abuse by neglect and negligence causes of action are derivative of the wrongful death cause of action and since the elder abuse by neglect and negligence causes of action are not sufficiently pled, the demurrer to the wrongful death cause of action is also fatally defective and the demurrer to that cause of action must be sustained.

The court having overruled the demurrers to the negligence and elder abuse by neglect causes of action the court overrules the demurrer that the wrongful death cause of action must be sustained as the negligence and elder abuse by neglect were deficient.

Defendants also argue that the wrongful death cause of action fails to allege sufficient facts with particularity to state a statutory cause of action for wrongful death and because the facts were not pled with particularity, the cause of action is also uncertain and ambiguous.

"A cause of action for the death of a person caused by the wrongful act or neglect of another may be asserted by any of the following persons or by the decedent's personal representative on their behalf: ¶ (a) The decedent's surviving spouse, domestic partner, children, and issue of deceased children, or, if there is no surviving issue of the decedent, the persons, including the surviving spouse or domestic partner, who would be entitled to the property of the decedent by intestate succession. ¶ (b) Whether or not qualified under subdivision (a), if they were dependent on the decedent, the putative spouse, children of the putative spouse, stepchildren, or parents. As used in this subdivision, "putative spouse" means the surviving spouse of a void or voidable marriage who is found by the court to have believed in good faith that the marriage to the decedent was valid. ¶ (c) A minor, whether or not qualified under subdivision (a) or (b), if, at the time of the decedent's death, the minor resided for the previous 180 days in the decedent's household and was dependent on the decedent for one-half or more of the minor's support. ¶ (d) This section applies to any cause of action arising on

or after January 1, 1993. ¶ (e) The addition of this section by Chapter 178 of the Statutes of 1992 was not intended to adversely affect the standing of any party having standing under prior law, and the standing of parties governed by that version of this section as added by Chapter 178 of the Statutes of 1992 shall be the same as specified herein as amended by Chapter 563 of the Statutes of 1996. ¶ (f)(1) For the purpose of this section, "domestic partner" means a person who, at the time of the decedent' s death, was the domestic partner of the decedent in a registered domestic partnership established in accordance with subdivision (b) of Section 297 of the Family Code. ¶ (2) Notwithstanding paragraph (1), for a death occurring prior to January 1, 2002, a person may maintain a cause of action pursuant to this section as a domestic partner of the decedent by establishing the factors listed in paragraphs (1) to (6), inclusive, of subdivision (b) of Section 297 of the Family Code, as it read pursuant to Section 3 of Chapter 893 of the Statutes of 2001, prior to its becoming inoperative on January 1, 2005. ¶ (3) The amendments made to this subdivision during the 2003-04 Regular Session of the Legislature are not intended to revive any cause of action that has been fully and finally adjudicated by the courts, or that has been settled, or as to which the applicable limitations period has run." (Code of Civil Procedure, § 377.60.)

"…in a wrongful death action involving abuse or neglect of an elderly or dependent adult, damages for pain and suffering may be awarded. (§ 15657, subd. (b); *Community Care and Rehabilitation Center v. Superior Court* (2000) 79 Cal.App.4th 787, 792, 94 Cal.Rptr.2d 343.)" (Intrieri v. Superior Court (2004) 117 Cal.App.4th 72, 82.)

"A cause of action for wrongful death is a statutory claim (§§ 377.60–377.62) that compensates specified heirs of the decedent for losses suffered as a result of a decedent's death. (*Quiroz v. Seventh Ave. Center* (2006) 140 Cal.App.4th 1256, 1263, 45 Cal.Rptr.3d 222 (*Quiroz*).) Any recovery is in the form of a lump sum verdict determined according to each

heirs' separate interest in the decedent's life (*Cross v. Pacific Gas & Elec. Co.* (1964) 60 Cal.2d 690, 692, 36 Cal.Rptr. 321, 388 P.2d 353 (*Cross*)), with each heir required to prove his or her own individual loss in order to share in the verdict. (§ 377.61; *Changaris v. Marvel* (1964) 231 Cal.App.2d 308, 312, 41 Cal.Rptr. 774.) Because a wrongful death action compensates an heir for his or her own independent pecuniary losses, it is one for "personal injury to the heir." (*Quiroz,* 140 Cal.App.4th at pp. 1263–1264, 45 Cal.Rptr.3d 222; *Fitch v. Select Products Co.* (2005) 36 Cal.4th 812, 819, 31 Cal.Rptr.3d 591, 115 P.3d 1233.) Thus, in a wrongful death action the "injury" is not the general loss of the decedent, but the particular loss of the decedent to each individual claimant." (San Diego Gas & Electric Co. v. Superior Court (2007) 146 Cal.App.4th 1545, 1550–1551.)

"In any action for wrongful death resulting from negligence, the complaint must contain allegations as to all the elements of actionable negligence. (*Potter v. Richards* (1955) 132 Cal.App.2d 380, 385, 282 P.2d 113.) Negligence involves the violation of a legal duty imposed by statute, contract or otherwise, by the defendant to the person injured, e.g., the deceased in a wrongful death action. (*Nally v. Grace Community Church* (1988) 47 Cal.3d 278, 292, 253 Cal.Rptr. 97, 763 P.2d 948.)" (Jacoves v. United Merchandising Corp. (1992) 9 Cal.App.4th 88, 105.)

"Because recovery is based on a statutory cause of action, the plaintiff must set forth facts in his complaint sufficiently detailed and specific to support an inference that each of the statutory elements of liability is satisfied. General allegations are regarded as inadequate. (*Susman v. City of Los Angeles* (1969) 269 Cal.App.2d 803, 809 [75 Cal.Rptr. 240]; *Vedder v. County of Imperial* (1974) 36 Cal.App.3d 654, 659 [111 Cal.Rptr. 728]; *County of Ventura v. City of Camarillo* (1978) 80 Cal.App.3d 1019, 1025 [144 Cal.Rptr. 296]; Van Alstyne, Cal.

Government Tort Liability (Cont.Ed.Bar 1980) § 3.72.)" (Mittenhuber v. City of Redondo Beach (1983) 142 Cal.App.3d 1, 5.)

Paragraph 102 of the complaint incorporates by reference all prior allegations of the complaint. The wrongful death cause of action also alleges: plaintiffs Hoaglund and Ballinger are the surviving children of decedent Patricia Light; as detailed in the complaint, as a proximate result of defendant's negligence and/or neglect of decedent, she was left unsupervised and allowed to fall and thereafter deprived of immediate medical attention, as well as being left unsupervised to quarantine in her room for multiple days without food or water, resulting in her premature death on November 26, 2021; as a further result of defendants' negligence and/or neglect of decedent, plaintiffs were deprived of the society, comfort, companionship, attention, services, support and friendship of decedent and are entitled to damages; as detailed in the complaint defendants' failure to supervise decedent caused her to fall multiple times, causing her to suffer from a head injury, broken hip, and wrist; and defendants failed to provide decedent with basic care, such as food and water, when they quarantined decedent in her room for 2-3 days causing her to become severely dehydrated, get a UTI, and require hospitalization. (Complaint, paragraphs 103-107.)

Under the totality of the facts and circumstances alleged in the complaint, the court finds that the complaint sets forth facts sufficiently detailed and specific to support an inference that each of the statutory elements of liability for wrongful death is satisfied.

The wrongful death cause of action of the complaint also sets forth the essential facts of plaintiffs' case with reasonable precision and with particularity sufficiently specific to acquaint defendants of the nature, source, and extent of the cause of action.

The demurrer to the wrongful death causes of action is overruled.

Defendants Cameron Park Senior Living, LLC's, Sequoia Senior Living, LLC's, CPSL SPE, LLC's and Kasner's Motion to Strike Punitive Damages Prayers and the Allegations in Support Thereof.

Defendants move to strike certain factual allegations from the complaint on the following grounds: plaintiffs have failed to plead with the required specificity allegations of fact that establish malice, oppression or fraud and they have merely alleged ordinary negligence; plaintiffs have not sufficiently alleged the corporate defendants had advanced knowledge of unfitness, ratification, or oppression, malice or fraud on the part of an officer, director or managing agent of the corporation; and certain allegations must be stricken as irrelevant.

Plaintiffs oppose the motion on the following grounds: the motion is untimely; defendants failed to meet and confer prior to filing the motion; plaintiffs have sufficiently alleged facts to establish oppression, malice or fraud; plaintiffs need only establish that punitive damages are an appropriate remedy for the causes of action pled in the complaint, therefore the motion should be denied; the motion to strike selected portions of the complaint as irrelevant should be denied, because the factual disputes raised by defendants concerning the citations and citation history are not the proper subject for judicial notice, this pleading proceeding should not be changed into a motion for summary judgment proceeding, and the allegations concerning the prior incidents in 2018 and 2019 are relevant in that the facts are alleged to establish defendants' knowledge of plaintiffs' decedent's history of unwitnessed falls and that she was a fall risk, yet defendants did nothing to address the risk multiple times until she broke her hip and became wheelchair bound; and defendants have cited no case law to support their argument that allegations that defendants had notice of plaintiffs' decedent's fall history and failure to act in conscious disregard of her safety are not permissible to be alleged to support a claim for punitive damages.

Defendants replied to the opposition.

Timeliness of Motion to Strike

Plaintiffs argue that the motion to strike filed by defendants Cameron Park Senior Living, LLC, Sequoia Senior Living, LLC, and Kasner was untimely and should be denied, because their responses to the complaint were due on March 10, March 12, and March 19, 2022 respectively and their declaration to extend the time to respond to meet and confer was untimely filed more than 30 days after each defendant was served without any attempt to meet and confer prior to filing the declaration

Plaintiffs essentially argue the court should exercise its discretion to not consider this late filed motion to strike.

"It is well settled that a plaintiff's failure to have the defendant's default regularly entered is an implied grant of further time to the defendant in which to appear in the action. *Tregambo v. Comanche Mill & Mining Co.*, 57 Cal. 501; *Reher v. Reed*, 166 Cal. 525, 528, 137 P. 263, 264, Ann. Cas. 1915C, 737; *Lunnun v. Morris*, 7 Cal. App. 710, 95 P. 907; *Mitchell v. Banking Corp.*, 81 Mont. 459, 264 P. 127." (Baird v. Smith (1932) 216 Cal. 408, 409.)

Plaintiffs did not seek entry of the default of defendants Cameron Park Senior Living, LLC, Sequoia Senior Living, LLC, and Kasner when they allegedly failed to timely file the demurrer, therefore, defendants had an implied grant of further time to appear in this action by filing the demurrer on April 20, 2022. The court rejects the plaintiffs' argument that the motion to strike was untimely filed and will consider the motion.

Meet and Confer Requirement

Plaintiffs argue the motion to strike should be denied, because there was no meet and confer prior to the filing of the motion, it was not until defendant's April 18, 2022 correspondence that there was any attempt to meet and confer, defendants admitted in that

correspondence that no meet correspondence had taken place due to a snafu at the office, and plaintiffs did not grant an extension given that defendants had more than enough time to meet and confer.

"A determination by the court that the meet and confer process was insufficient is not grounds to grant or deny the motion to strike." (Code of Civil Procedure, § 435.5(a)(4))

Any deficiency in the meet and confer process not being grounds to deny the motion to strike, the court rejects the plaintiffs' argument that the motion to strike should be denied.

.Defendants' Request for Judicial Notice and Plaintiffs' Objections to the Requests

Defendants request the court take judicial notice of a printout from the California Department of Social Services website regarding the subject facility (Exhibit A) and correspondence from the California Department of Social Services, Community Care Licensing Division, dated January 3, 2022, which states that defendant Cameron Park Senior Living, LLC's appeal was granted, and the citation dismissed.

Plaintiffs alleged: the Department substantiated the complaint finding that plaintiff had become severely dehydrated and had a UTI due to defendants' lack of care and supervision, found defendants failed to provide her with food and water for 2–3 days, and that defendants' facility failed to promptly report her condition to medical staff; and defendants were cited with two Type-A deficiencies as a result of these failures. (Complaint, paragraph 27.)

"The grounds for a motion to strike shall appear on the face of the challenged pleading or from any matter of which the court is required to take judicial notice." (Code of Civil Procedure, § 437(a).)

"We must take judicial notice of matters properly noticed by the trial court, and may take notice of any matter specified in Evidence Code section 452. (Evid.Code, § 459, subd. (a).) While we may take judicial notice of court records and official acts of state agencies

(Evid.Code, § 452, subds.(c), (d)), the truth of matters asserted in such documents is not subject to judicial notice. (*Sosinsky v. Grant* (1992) 6 Cal.App.4th 1548, 1564–1565, 8 Cal.Rptr.2d 552.) We also may decline to take judicial notice of matters that are not relevant to dispositive issues on appeal. (*Doe v. City of Los Angeles* (2007) 42 Cal.4th 531, 544, fn. 4, 67 Cal.Rptr.3d 330, 169 P.3d 559; *Schifando v. City of Los Angeles, supra,* 31 Cal.4th at p. 1089, fn. 4, 6 Cal.Rptr.3d 457, 79 P.3d 569.)" (Emphasis added.) (Arce v. Kaiser Foundation Health Plan, Inc. (2010) 181 Cal.App.4th 471, 482.)

"As we observed in *Mangini,* although "courts may notice official acts and public records, 'we do not take judicial notice of the truth of all matters stated therein.' [Citations.] '[T]he taking of judicial notice of the official acts of a governmental entity does not in and of itself require acceptance of the truth of factual matters which might be deduced therefrom, since in many instances what is being noticed, and thereby established, is no more than the existence of such acts and not, without supporting evidence, what might factually be associated with or flow therefrom.' " (*Id.,* at pp. 1063–1064, 31 Cal.Rptr.2d 358, 875 P.2d 73.)" (Emphasis added.) (People v. Castillo (2010) 49 Cal.4th 145, 157.)

Exhibit A to the defendants' request for judicial notice (RJN) does not appear to state any official act taken by the Department of Social Services and is only a list of 41 visits to the subject facility. Exhibit A also states at the conclusion of the list that "All visits incudes Inspection Visits, other visits and may include complaint visits". (Emphasis added.) In other words, the list admittedly does not identify complaint visits and is not designed to set forth a history of complaints against the facility. It is the party requesting judicial notice of material that must provide the court and each party with a copy of the material establishing the facts and matters of which judicial notice is requested. (See Rules of Court, Rule 3.1306(c).) The court may not take judicial notice of the truth of any fact concerning the history of Department

complaints or citations regarding the subject facility from Exhibit A. The objection to taking judicial notice of RJN Exhibit A is sustained.

Exhibit B is a letter from the Department of Social Services, Community Care Licensing Division granting a first level administrative appeal from two citations. The objection to RJN Exhibit B is sustained as to the facts and factual findings stated in the letter. The court takes judicial notice that on January 3, 2022, the Department of Social Services, Community Care Licensing Division granted defendant's first level administrative appeal and dismissed the citation.

The complaint alleges: after the Department of Social Services investigated the plaintiffs' complaint regarding defendants failure to provide necessities such as food and water to plaintiffs' decedent during isolation, the Department substantiated the complaint finding that she had become severely dehydrated and had a UTI due to defendants' lack of care and supervision, found defendants failed to provide her with food and water for 2–3 days, and that defendants' facility failed to promptly report her condition to medical staff; and defendants were cited with two Type-A deficiencies as a result of these failures. (Complaint, paragraph 27.)

"When judicial notice is taken of a document, however, the truthfulness and proper interpretation of the document are disputable. [Citation.]' [Citation.]" (*Fremont, supra,* 148 Cal.App.4th at p. 113, 55 Cal.Rptr.3d 621.) Moreover, " 'Taking judicial notice of a document is not the same as accepting the truth of its contents or accepting a particular interpretation of its meaning. [Citation.] On a demurrer a court's function is limited to testing the legal sufficiency of the complaint. [Citation.] "A demurrer is simply not the appropriate procedure for determining the truth of disputed facts." [Citation.] The hearing on demurrer may not be turned into a contested evidentiary hearing through the guise of having the court take judicial notice of documents whose truthfulness or proper interpretation are disputable. [Citation.] ... " '[J]udicial

notice of matters upon demurrer will be dispositive only in those instances where there is not or cannot be a factual dispute concerning that which is sought to be judicially noticed.' " [Citation.]' " (*Id.* at pp. 113–114, 55 Cal.Rptr.3d 621.)" (Emphasis added.) (Unruh-Haxton v. Regents of University of California (2008) 162 Cal.App.4th 343, 364–365.)

The fact that defendant Cameron Park Senior Living, LLC's appeal was granted and a citation dismissed does not establish for the purposes of demurrer that the citation at issue in that appeal was the result of the plaintiffs' complaint that plaintiff had become severely dehydrated and had a UTI due to defendants' lack of care and supervision, defendants failure to provide her with food and water for 2–3 days, and that defendants' facility failed to promptly report her condition to medical staff, which resulted in two Type-A deficiencies. The truthfulness and proper interpretation of the January 3, 2022, grant of appeal are disputable. Therefore, judicial notice of the fact that an appeal was granted, and citation dismissed does not controvert the above-cited allegations of the complaint. The objection to taking judicial notice of RJN Exhibit B is sustained.

Motion to Strike Principles

"The court may, upon a motion made pursuant to Section 435, or at any time in its discretion, and upon terms it deems proper: ¶ (a) Strike out any irrelevant, false, or improper matter inserted in any pleading. ¶ (b) Strike out all or any part of any pleading not drawn or filed in conformity with the laws of this state, a court rule, or an order of the court." (Code of Civil Procedure, § 436.)

"The grounds for a motion to strike shall appear on the face of the challenged pleading or from any matter of which the court is required to take judicial notice." (Code of Civil Procedure, § 437(a).) "Where the motion to strike is based on matter of which the court may take judicial notice pursuant to Section 452 or 453 of the Evidence Code, such matter shall be specified in

the notice of motion, or in the supporting points and authorities, except as the court may otherwise permit." (Code of Civil Procedure, § 437(b).)

"A motion to strike, like a demurrer, challenges the legal sufficiency of the complaint's allegations, which are assumed to be true. (See *Clauson v. Superior Court* (1998) 67 Cal.App.4th 1253, 1255, 79 Cal.Rptr.2d 747 [an order striking punitive damages allegations is reviewed de novo].)" (Blakemore v. Superior Court (2005) 129 Cal.App.4th 36, 53.)

"In passing on the correctness of a ruling on a motion to strike, judges read allegations of a pleading subject to a motion to strike as a whole, all parts in their context, and assume their truth. (*Courtesy Ambulance Service v. Superior Court* (1992) 8 Cal.App.4th 1504, 1519, 11 Cal.Rptr.2d 161; *Dawes v. Superior Court* (1980) 111 Cal.App.3d 82, 91, 168 Cal.Rptr. 319; see California Judges Benchbook, Civil Proceedings Before Trial (1995) § 12.94, p. 611.) In ruling on a motion to strike, courts do not read allegations in isolation. (*Perkins v. Superior Court* (1981) 117 Cal.App.3d 1, 6, 172 Cal.Rptr. 427.)" (Clauson v. Superior Court (1998) 67 Cal.App.4th 1253, 1255.)

"In determining whether a complaint states facts sufficient to sustain punitive damages, the challenged allegations must be read in context with the other facts alleged in the complaint. Further, even though certain language pleads ultimate facts or conclusions of law, such language when read in context with the facts alleged as to defendants' conduct may adequately plead the evil motive requisite to recovery of punitive damages. (*Perkins v. Superior Court* (1981) 117 Cal.App.3d 1, 6-7, 172 Cal.Rptr. 427.)" (Monge v. Superior Court (1986) 176 Cal.App.3d 503, 510.)

"In order to survive a motion to strike an allegation of punitive damages, the ultimate facts showing an entitlement to such relief must be pled by a plaintiff. (*Grieves v. Superior Court* (1984) 157 Cal.App.3d 159, 166, 203 Cal.Rptr. 556; *Blegen v. Superior Court* (1981) 125

Cal.App.3d 959, 962–963, 178 Cal.Rptr. 470.) In passing on the correctness of a ruling on a motion to strike, judges read allegations of a pleading subject to a motion to strike as a whole, all parts in their context, and assume their truth. (*Courtesy Ambulance Service v. Superior Court* (1992) 8 Cal.App.4th 1504, 1519, 11 Cal.Rptr.2d 161; *Dawes v. Superior Court* (1980) 111 Cal.App.3d 82, 91, 168 Cal.Rptr. 319; see California Judges Benchbook, Civil Proceedings Before Trial (1995) § 12.94, p. 611.) In ruling on a motion to strike, courts do not read allegations in isolation. (*Perkins v. Superior Court* (1981) 117 Cal.App.3d 1, 6, 172 Cal.Rptr. 427.) We review an order striking punitive damages allegations de novo. (*Angie M. v. Superior Court* (1995) 37 Cal.App.4th 1217, 1223, 44 Cal.Rptr.2d 197.)" (Clauson v. Superior Court (1998) 67 Cal.App.4th 1253, 1255.)

"In the construction of a pleading, for the purpose of determining its effect, its allegations must be liberally construed, with a view to substantial justice between the parties." (Code of Civil Procedure, § 452.)

"Not only must there be circumstances of oppression, fraud or malice, but facts must be alleged in the pleading to support such a claim. (Citation omitted.)" (Grieves v. Superior Court (1984) 157 Cal.App.3d 159, 166.)

"Punitive damages are "available to a party who can plead and prove the facts and circumstances set forth in Civil Code section 3294." *Hilliard v. A.H. Robins Co.,* 148 Cal.App.3d 374, 392, 196 Cal.Rptr. 117 (1983). "To support punitive damages, the complaint ... must allege ultimate facts of the defendant's oppression, fraud, or malice." *Cyrus v. Haveson,* 65 Cal.App.3d 306, 316–317, 135 Cal.Rptr. 246 (1976). Pleading the language in section 3294 "is not objectionable when sufficient facts are alleged to support the allegation." *Perkins v. Superior Court,* 117 Cal.App.3d 1, 6–7, 172 Cal.Rptr. 427 (1981)." (Altman v. PNC Mortg. (E.D. Cal. 2012) 850 F.Supp.2d 1057, 1085.)

"In an action for the breach of an obligation not arising from contract, where it is proven by clear and convincing evidence that the defendant has been guilty of oppression, fraud, or malice, the plaintiff, in addition to the actual damages, may recover damages for the sake of example and by way of punishing the defendant." (Civil Code, § 3294(a).)

Inasmuch as the facts when taken as true for the purposes of a motion to strike must establish that punitive damages are recoverable to avoid an order striking the punitive damages claim and punitive damages are only recoverable where the facts show malice, fraud, or oppression by clear and convincing evidence, the facts purportedly establishing malice, fraud or oppression must be viewed considering the clear and convincing burden of proof.

" 'Malice' means conduct which is intended by the defendant to cause injury to the plaintiff or despicable conduct which is carried on by the defendant with a willful and conscious disregard of the rights or safety of others." (Civil Code, § 3294(c)(1).)

" 'Oppression' means despicable conduct that subjects a person to cruel and unjust hardship in conscious disregard of that person's rights." (Civil Code, § 3294(c)(2).)

" 'Fraud' means an intentional misrepresentation, deceit, or concealment of a material fact known to the defendant with the intention on the part of the defendant of thereby depriving a person of property or legal rights or otherwise causing injury." (Civil Code, § 3294(c)(3).)

"The punitive damages theory cannot be predicated on the breach of contract cause of action without an underlying tort. (*Chelini v. Nieri* (1948) 32 Cal.2d 480, 486–487, 196 P.2d 915; *Crogan v. Metz* (1956) 47 Cal.2d 398, 405, 303 P.2d 1029; *Ericson v. Playgirl, Inc.* (1977) 73 Cal.App.3d 850, 854, 140 Cal.Rptr. 921; *Quigley v. Pet, Inc.* (1984) 162 Cal.App.3d 877, 887, 208 Cal.Rptr. 394.) Neither evidence of mere negligence (*Kendall Yacht Corp. v. United California Bank* (1975) 50 Cal.App.3d 949, 959, 123 Cal.Rptr. 848; see *Nolin v. National*

Convenience Stores, Inc. (1979) 95 Cal.App.3d 279, 284–288, 157 Cal.Rptr. 32) nor constructive fraud (*Delos v. Farmers Insurance Group* (1979) 93 Cal.App.3d 642, 656–657, 155 Cal.Rptr. 843, and cases there cited; *Estate of Witlin* (1978) 83 Cal.App.3d 167, 177, 147 Cal.Rptr. 723; compare *Day v. Rosenthal* (1985) 170 Cal.App.3d 1125, 1160, 217 Cal.Rptr. 89) will support a punitive damages award without a showing of the statutory fraud, malice, or oppression." (Palmer v. Ted Stevens Honda, Inc. (1987) 193 Cal.App.3d 530, 536.)

"California does *not* recognize punitive damages for conduct that is grossly negligent or reckless. (See *Taylor v. Superior Court* (1979) 24 Cal.3d 890, 899–900 [157 Cal.Rptr. 693, 598 P.2d 854] [noting "ordinarily, routine negligent or even reckless disobedience of [the] laws would not justify an award of punitive damages"]; *Egan v. Mutual of Omaha Ins. Co.* (1979) 24 Cal.3d 809, 828 [169 Cal.Rptr. 691, 620 P.2d 141] [noting that punitive damages should be awarded "only in the most outrageous cases" and noting that to be awarded, the "act complained of must not only be willful, in the sense of intentional, but it must be accompanied by some aggravating circumstance amounting to malice"].)" (Colombo v. BRP US Inc. (2014) 230 Cal.App.4th 1442, 1456, fn. 8.)

Under the statute, "malice does not require actual intent to harm. [Citation.] Conscious disregard for the safety of another may be sufficient where the defendant is aware of the probable dangerous consequences of his or her conduct and he or she willfully fails to avoid such consequences. [Citation.] Malice may be proved either expressly through direct evidence or by implication through indirect evidence from which the jury draws inferences. [Citation.]" (*Angie M. v. Superior Court* (1995) 37 Cal.App.4th 1217, 1228, 44 Cal.Rptr.2d 197.)" (Pfeifer v. John Crane, Inc. (2013) 220 Cal.App.4th 1270, 1299.)

The Third District Court of Appeal has stated: "The adjective "despicable" connotes conduct that is " '... so vile, base, contemptible, miserable, wretched or loathsome that it would be

looked down upon and despised by ordinary decent people.' " (*Mock v. Michigan Millers Mutual Ins. Co.* (1992) 4 Cal.App.4th 306, 331, 5 Cal.Rptr.2d 594, quoting BAJI No. 14.72.1 (1989 rev.); *Cloud v. Casey* (1999) 76 Cal.App.4th 895, 912, 90 Cal.Rptr.2d 757.) " '[A] breach of a fiduciary duty alone without malice, fraud or oppression does not permit an award of punitive damages. [Citation.] The wrongdoer " 'must act with the intent to vex, injure, or annoy, or with a conscious disregard of the plaintiff's rights. [Citations.]' " Punitive damages are appropriate if the defendant's acts are reprehensible, fraudulent or in blatant violation of law or policy. The mere carelessness or ignorance of the defendant does not justify the imposition of punitive damages.... Punitive damages are proper only when the tortious conduct rises to levels of extreme indifference to the plaintiff's rights, a level which decent citizens should not have to tolerate.' " (*Tomaselli v. Transamerica Ins. Co.* (1994) 25 Cal.App.4th 1269, 1287, 31 Cal.Rptr.2d 433.) ¶ The definition of malice has not always included the requirement of willful and despicable conduct. Prior to 1980, section 3294 did not define malice. It was construed to mean malice in fact, which could be proven directly or by implication (*Taylor v. Superior Court* (1979) 24 Cal.3d 890, 894, 157 Cal.Rptr. 693, 598 P.2d 854 (*Taylor*); 6 Witkin, Summary of Cal. Law (9th ed. 1988) Torts, § 1335, p. 793) and could be established by conduct that was done only with "a conscious disregard of the safety of others...." (*Taylor, supra,* at p. 895, 157 Cal.Rptr. 693, 598 P.2d 854.) Relying on the reasoning in *G.D. Searle & Co. v. Superior Court* (1975) 49 Cal.App.3d 22, 122 Cal.Rptr. 218, the *Taylor* court recognized that recklessness alone is insufficient to sustain an award of punitive damages because " '[t]he central spirit of the exemplary damage statute, the demand for evil motive, is violated by an award founded upon recklessness alone.' " (24 Cal.3d at p. 895, 157 Cal.Rptr. 693, 598 P.2d 854.) The court concluded that "[i]n order to justify an award of punitive damages on this basis, the plaintiff must establish that the defendant was aware of the probable dangerous consequences of his

conduct, and that he willfully and deliberately failed to avoid those consequences." (*Id.* at pp. 895-896, 157 Cal.Rptr. 693, 598 P.2d 854.) Applying that test, the Supreme Court directed the trial court to reinstate a claim for punitive damages where it was alleged the defendant was operating a motor vehicle while intoxicated, under circumstances which disclosed a conscious disregard of the probable dangerous consequences. [FN 14.] ¶ FN14. The circumstances alleged in *Taylor* were that a car driven by the defendant collided with plaintiff's car causing him serious injuries, that at the time of the collision, the defendant was drinking an alcoholic beverage and under its influence, he had been an alcoholic for a substantial period of time and was well aware of the serious nature of his alcoholism, he had a history and practice of driving a motor vehicle while under the influence of alcohol, he had previously caused a serious automobile accident while under the influence of alcohol, and had been convicted numerous times for driving under the influence of alcohol. (*Id.* at p. 893, 157 Cal.Rptr. 693, 598 P.2d 854.) ¶ In 1980, the Legislature amended section 3294 by adding the definition of malice stated in *Taylor, supra,* 24 Cal.3d 890, 157 Cal.Rptr. 693, 598 P.2d 854. (Stats.1980, ch. 1242, § 1, pp. 4217-4218; *College Hospital Inc. v. Superior Court* (1994) 8 Cal.4th 704, 713, 34 Cal.Rptr.2d 898, 882 P.2d 894.) That definition was amended in 1987. As amended, malice, based upon a conscious disregard of the plaintiff's rights, requires proof that the defendant's conduct is "despicable" and "willful." (Stats.1987, ch. 1498, § 5.) The statute's reference to "despicable conduct" represents "a new substantive limitation on punitive damage awards." (*College Hospital, Inc. v. Superior Court, supra,* 8 Cal.4th at p. 725, 34 Cal.Rptr.2d 898, 882 P.2d 894.) ¶ Additionally, the 1987 amendment increased the burden of proof. Malice or oppression must now be established "by clear and convincing evidence." (Stats.1987, ch. 1498, § 5.) That standard "requires a finding of high probability .... ' "so clear as to leave no substantial doubt"; "sufficiently strong to command the unhesitating assent of every reasonable

mind." ' [Citation.]" (*In re Angelia P.* (1981) 28 Cal.3d 908, 919, 171 Cal.Rptr. 637, 623 P.2d 198, superseded by statute on other grounds as stated in *Orange County Social Services Agency v. Jill V.* (1994) 31 Cal.App.4th 221, 229, 36 Cal.Rptr.2d 848; *Shade Foods, Inc. v. Innovative Products Sales & Marketing, Inc.* (2000) 78 Cal.App.4th 847, 891, 93 Cal.Rptr.2d 364.)" (Emphasis added.) (Lackner v. North (2006) 135 Cal.App.4th 1188, 1211-1213.)

The Third District Court of Appeal has also stated: "" 'The wrongdoer " 'must act with the intent to vex, injure, or annoy, or with a conscious disregard of the plaintiff's rights. [Citations.]' " Punitive damages are appropriate if the defendant's acts are reprehensible, fraudulent or in blatant violation of law or policy. The mere carelessness or ignorance of the defendant does not justify the imposition of punitive damages.... Punitive damages are proper only when the tortious conduct rises to levels of extreme indifference to the plaintiff's rights, a level which decent citizens should not have to tolerate.' " (*Tomaselli v. Transamerica Ins. Co.* (1994) 25 Cal.App.4th 1269, 1287, 31 Cal.Rptr.2d 433.)" (George F. Hillenbrand, Inc. v. Insurance Co. of North America (2002) 104 Cal.App.4th 784, 815.) The Third District Court of Appeal further stated: "" ' "Despicable conduct" is conduct which is so vile, base, contemptible, miserable, wretched or loathsome that it would be looked down upon and despised by ordinary decent people.' " (*Mock*, supra, 4 Cal.App.4th at p. 331, 5 Cal.Rptr.2d 594.)" (George F. Hillenbrand, Inc. v. Insurance Co. of North America (2002) 104 Cal.App.4th 784, 817.)

With the above-cited principles in mind, the court will rule on the motion to strike.

- Alleged Facts Concerning Two Type A Deficiencies Resulting from Failure to Provide Food and Water

Defendants argue that the portion of the allegations in paragraph 27 alleging that the Department of Social Services substantiated the plaintiff's complaint regarding plaintiff's decedent becoming dehydrated, contracting a UTI and being hospitalized because of failure to

provide plaintiffs' decedent with food and water is an irrelevant matter that must be stricken, because the court can judicially notice that the deficiencies were successfully appealed and withdrawn.

"Irrelevant and redundant matter inserted in a pleading may be stricken by the court. § 453, Code Civ.Proc. But a motion to strike cannot be made to serve the purpose of a special demurrer. Where a motion to strike is so broad as to include relevant matters, the motion should be denied in its entirety. *Allerton v. King*, 96 Cal.App. 230, 234, 274 P. 90; *People ex rel. Department of Public Works v. Buellton Development Co.*, 58 Cal.App.2d 178, 185, 136 P.2d 793." (Hill v. Wrather (1958) 158 Cal.App.2d 818, 823.)

"A material allegation in a pleading is one essential to the claim or defense and which could not be stricken from the pleading without leaving it insufficient as to that claim or defense." (Code of Civil Procedure, § 431.10(a).)

"An immaterial allegation in a pleading is any of the following: ¶ (1) An allegation that is not essential to the statement of a claim or defense. ¶ (2) An allegation that is neither pertinent to nor supported by an otherwise sufficient claim or defense. ¶ (3) A demand for judgment requesting relief not supported by the allegations of the complaint or cross-complaint." (Code of Civil Procedure, § 431.10(b).)

"An "immaterial allegation" means "irrelevant matter" as that term is used in Section 436." (Code of Civil Procedure, § 431.10(c).)

Defendants request the court take judicial notice of a printout from the California Department of Social Services website regarding the subject facility (Defendants' RJN Exhibit A) and correspondence from the California Department of Social Services, community Care Licensing Division, dated January 3, 2022, which states that defendant Cameron Park Senior Living, LLC's appeal was granted, and the citation dismissed (Defendants' RJN Exhibit B.).

While grounds to strike portions of a complaint may be premised upon any matter of which the court is required to take judicial notice (Code of Civil Procedure, § 437(a).), the court has already sustained objections to defendants' requests for judicial notice of those Exhibits.

Exhibit A to the defendants' request for judicial notice (RJN) does not appear to state any official act taken by the Department of Social Services and is only a list of facility reports of 41 visits to the facility. Therefore, the court sustained the objection to the request for judicial notice of that Exhibit.

Exhibit B is a letter from the Department of Social Services, Community Care Licensing Division granting a first level administrative appeal from two citations. The objection to RJN Exhibit B was sustained as to the facts and factual findings stated in the letter. The court takes judicial notice that on January 3, 2022, the Department of Social Services, Community Care Licensing Division granted defendant's first level administrative appeal and dismissed the citation.

The complaint alleges: after the Department of Social Services investigated the plaintiffs' complaint regarding defendants failure to provide necessities such as food and water to plaintiffs' decedent during isolation, the Department substantiated the complaint finding that she had become severely dehydrated and had a UTI due to defendants' lack of care and supervision, found defendants failed to provide her with food and water for 2–3 days, and that defendants' facility failed to promptly report her condition to medical staff; and defendants were cited with two Type-A deficiencies as a result of these failures. (Complaint, paragraph 27.)

The fact that defendant Cameron Park Senior Living, LLC's appeal was granted and a citation dismissed does not establish for the purposes of this motion to strike that the citation at issue in that appeal was the result of the plaintiffs' complaint that plaintiff had become severely dehydrated and had a UTI due to defendants' lack of care and supervision, defendants failure

to provide her with food and water for 2–3 days, and that defendants' facility failed to promptly report her condition to medical staff, which resulted in two Type-A deficiencies. The truthfulness and proper interpretation of the January 3, 2022, grant of appeal are disputable. Therefore, judicial notice of the fact that an appeal was granted, and citation dismissed does not controvert the above-cited allegations of the complaint..

The allegations of paragraph 27 are relevant to this action

The motion to strike portions of paragraph 27 requiring allegations that the Department substantiated a complaint concerning plaintiffs' decedent's care at the facility is denied.

- Facts Concerning Citation History

Defendants move to strike factual allegations contained in paragraphs 42 and 70-72 concerning an alleged citation history with the Department of Social Services and misrepresentations to the Department of Social Services. Defendants argue that this history is irrelevant and improper as it did not occur, and plaintiff alleges no facts to support those assertions. Defendants concede that there were two Type-B citations in 2017 and 2018 concerning the subject facility indicating a potential for a health and safety impact and contend that the facility purportedly appropriately addressed those citations, given that no further citations were issued. (Defendants Memorandum of Points and Authorities in Support of Motion to Strike, page 9, lines 15-17.)

First, plaintiff's request for judicial notice of Exhibit A is only a list of facility reports of 41 visits to the facility. Exhibit A also states at the conclusion of the list that "All visits incudes Inspection Visits, other visits and may include complaint visits". In other words, the list admittedly does not identify complaint visits and is not designed to set forth a history of complaints against the facility. It is the party requesting judicial notice of material that must

provide the court and each party with a copy of the material establishing the facts and matters of which judicial notice is requested. (See Rules of Court, Rule 3.1306(c).)

Second, the court sustained plaintiffs' objections to defendants' request for judicial notice and does not take judicial notice of Exhibit A – a Department of Social Services print out from its web site concerning a list of visits to the subject facility. The court may not take judicial notice of the truth of any fact that the allegations of a history of Department complaints or citations regarding the subject facility are overstated for the reason stated earlier in this ruling regarding the plaintiffs' objections to judicial notice.

Therefore, those allegations are relevant to this action.

Defendants' motion to strike factual allegations contained in paragraphs 42 and 70-72 is denied.

- Facts Concerning Incidents Outside the Statute of Limitations

Defendants move to strike the portion of paragraph 24 containing allegations about plaintiffs' decedent's unwitnessed falls at the facility in 2018 and 2019 on the ground that the alleged incidents occurred outside the applicable statute of limitations and are irrelevant and inflammatory information and those incidents are neither pertinent or essential and do not support the claims in this action.

Plaintiffs argue in opposition that the allegations concerning the prior incidents in 2018 and 2019 are relevant in that the facts are alleged to establish defendants' knowledge of plaintiffs' decedent's history of unwitnessed falls and she was a fall risk, yet defendants did nothing to address the risk multiple times until she broke her hip and became wheelchair bound; and defendants have cited no case law to support their argument that allegations that defendants had notice of plaintiffs' decedent's fall history and failure to act in conscious disregard of her safety are not permissible to be alleged to support a claim for punitive damages.

As stated earlier in this ruling, “The court may, upon a motion made pursuant to Section 435, or at any time in its discretion, and upon terms it deems proper: ¶ (a) Strike out any irrelevant, false, or improper matter inserted in any pleading.” (Code of Civil Procedure, § 436(a).)

Plaintiffs have alleged the facts concerning the 2018 and 2019 unwitnessed fall incidents to establish a pattern and practice of defendants that resulted in the plaintiffs’ decedent falling, to show a history of plaintiffs’ decedent falling when unattended that when taken as true for the purposes of this motion would establish defendants’ knowledge that plaintiffs’ decedent needed supervision in order to prevent the later fall that caused her injuries that are one of the subjects of this litigation, and that defendants’ continued alleged understaffing despite this knowledge is evidence of malice and/or oppression by corporate managers. The allegations of the 2018 and 2019 unwitnessed falls are relevant to this action and proper matters to include in the complaint. The motion to strike those allegations is denied.

- Allegations of Oppression and Malice by Corporate Management

Defendants contend that allegations that defendants intentionally understaffed the facility and failed to provide sufficient staff and sufficient staff training is insufficient to allege corporate oppression and malice and that allegations that defendants had a plan or profit driven scheme to understaff the facility is not sufficient without additional factual allegations to establish those assertions.

“…allegations of ultimate fact are acceptable. An appellate court has held: “In order to plead a cause of action, the complaint must contain a "statement of the facts constituting the cause of action, in ordinary and concise language." (Code of Civil Procedure, § 425.10, subd.(a).) While it is true that pleading conclusions of law does not fulfill this requirement, it has long been recognized that "[t]he distinction between conclusions of law and ultimate facts is not at

all clear and involves at most a matter of degree. [Citations.] For example, the courts have permitted allegations which obviously included conclusions of law and have termed them 'ultimate facts' or 'conclusions of fact.'" (*Burks v. Poppy Construction Co*. (1962) 57 Cal.2d 463, 473 [20 Cal.Rptr. 609, 370 P.2d 313].) What is important is that the complaint as a whole contain sufficient facts to apprise the defendant of the basis upon which the plaintiff is seeking relief. (*Youngman v. Nevada Irrigation Dist*. (1969) 70 Cal.2d 240 [74 Cal.Rptr. 398, 449 P.2d 462]; *Semole v. Sansoucie* (1972) 28 Cal.App.3d 714 [104 Cal.Rptr. 879].) The stricken language must be read not in isolation, but in the context of the facts alleged in the rest of petitioner's complaint." (Perkins v. Superior Court (1981) 117 Cal.App.3d 1, 6.)

The appellate court in Perkins, supra, found that the trial court abused its discretion is striking language that the defendant was guilty of fraud, oppression, and malice as a legal conclusion. The appellate court stated: "The allegation that defendants were guilty of "oppression, fraud, and malice" simply pleaded a claim for punitive damages in the language of the statute authorizing such damages. (Civ.Code, s 3294.) Pleading in the language of the statute is not objectionable when sufficient facts are alleged to support the allegation. (*Semole v. Sansoucie*, supra, 28 Cal.App.3d 714, 718-719, 104 Cal.Rptr. 897.)" (Perkins v. Superior Court (1981) 117 Cal.App.3d 1, 6–7.)

The complaint alleges: plaintiff's decedent was admitted to the subject facility in 2017 when she was 85 years-old and suffering from Alzheimer's dementia; due to her condition, she was dependent on others for her care needs and was a high fall risk due to wandering and dementia, which was known by defendants as they assessed her to determine if she was appropriate for the facility; the assessment called for extensive assistance to be provide to prevent falls and significant assistance with showering, dressing, and transfers; the assessment also called for frequent checks as she required assistance with toileting, bathing,

dressing and socializing; although defendants knew she could ambulate on her own and tended to wander due to dementia, defendants did not appropriately develop or initiate a care plan to meet her needs; defendants failed to supervise and assist her with eating and drinking; defendants failed to provide her with assistance when she needed it and called for help; as a result she was found on May 8, 2018 on the floor of the front lobby after an unwitnessed fall, on February 19, 2019 staff found her on her bathroom floor after a unwitnessed fall, and on July 12, 2019 she was found on the ground after another unwitnessed fall; she was bleeding from the head after the July 2019 fall and was transported to the hospital emergency room receiving head imaging and eleven sutures to the head and was held for observation; defendants failed to reassess her needs and provide needed supervision even after these three unwitnessed falls; on February 24, 2020 she fell again and was unattended on the floor for hours throughout the night; when she was found, she was returned to her room without any assessment or medical examination or care; staff noticed discoloration of her right hand was observed; the defendants failed to fully inform plaintiff Hoaglund about the fall, instead downplaying the incident and telling plaintiff that she had bruised her hand; the next day she was sent to the hospital emergency room where she was diagnosed as suffering from a left wrist fracture and displaced left hip fracture; following hip surgery she was returned to the facility and she was required to undergo physical therapy; defendants represented to her family that she would receive the physical therapy according to doctor orders; defendants delayed arranging for such therapy and only arranged the therapy after multiple calls and requests by her daughter; the Department substantiated the complaint finding that plaintiff had become severely dehydrated and had a UTI due to defendants' lack of care and supervision, found defendants failed to provide her with food and water for 2–3 days, and that defendants' facility failed to promptly report her condition to medical staff; defendants were cited with two Type-A

deficiencies as a result of these failures; defendants, their owners, officers, directors, managing agents and staff, including defendant Kasner, had actual and constructive knowledge of the requirements for custodial care at the time plaintiff's decedent was admitted to the facility and thus knew that a failure to implement, follow, and enforce the applicable regulations deprived plaintiffs' decedent of custodial care and amounted to reckless neglect; defendants knew that plaintiff's decedent was at fall risk that required supervision and check-ins to prevent/reduce the risk of falls yet having specific notice of this, defendants continued to fail to provide those services eventually causing plaintiff's decedent to suffer injuries, including a left wrist fracture and displaced hip fracture; defendants then delayed assessment of her and seeking medical care for the injuries; plaintiff also suffered severe dehydration and a UTI by defendants withholding basic care such as supervision, water and food; this subjected plaintiffs' decedent to severe and extreme physical pain and suffering injuries, mental anguish and distress; defendants violated 22 CCR § 87411 by failing to staff the facility in sufficient numbers and with the competency to provide the services necessary to meet plaintiffs' decedents' needs and failed to make sure the staff was appropriate trained; defendants violated 22 CCR § 87464 by failing to meet plaintiffs' decedent's needs and failing to provide basic services such as care and supervision, a safe and healthful living environment, personal assistance with daily living and care as needed by plaintiffs' decedent and failing to provide regular observation; defendants' conduct is part of a general business practice of defendants that exists in part from defendants' conscious, calculated choice to reduce staff and to save money on personnel costs, thus understaffing the building, yet improperly accepting and maintaining high acuity residents to maximize profits directly and indirectly, despite knowing they had legal obligations under State regulations and other laws to staff the facility to meet the residents' needs and not to retain residents with prohibited conditions; defendants knew they

had to provide trained and competent caregiver personnel especially in light of their citation history with the Department of Social Services, but defendants instead took shortcuts at the cost and risk of its residents' health and wellbeing; defendants knew that adverse consequences would flow from their understaffing, including mistreatment, and neglect of their elderly and vulnerable residents; defendant willfully and recklessly made a calculated decision to promote their financial condition at the expense of their legal and fiduciary obligations to their elderly and dementia residents, including plaintiffs' decedent; defendant consciously and continually failed to provide even the most basic level of care when they failed to provide adequate numbers of trained staff at the facility and adequate monitoring and assessment that resulted in harm to plaintiff; defendants knew they were unable to provide the promised level of care due to insufficient staffing or insufficient training of staff to meet the high acuity needs of the residents; defendants knew or should have known that defendants' failure to deliver on these promises would cause harm to plaintiffs' decedent; and defendants' conduct was a substantial factor in causing plaintiffs' decedent's harm, including the loss of money paid to defendants for her care, physical injuries, deprivation of food and water leading to hospitalization, loss of dignity, and physical and emotional distress (Complaint paragraphs 23-27, 32, 33, 38, 40, 42, 88, 89, and 92.)

The allegations of the complaint when taken as true for the purposes of this motion to strike establish defendants managing agents and the defendant corporations engaged in malicious and oppressive conduct related to plaintiffs' decedent in that the facts show defendant engaged in despicable conduct which was carried on by the defendants with a willful and conscious disregard of the rights or safety of plaintiff's decedent and despicable conduct that subjected plaintiffs' decedent to cruel and unjust hardship in conscious disregard of her rights.

The motion to strike is denied.

TENTATIVE RULING # 9: DEFENDANTS DEMURRERS TO THE COMPLAINT ARE OVERRULED. DEFENDANTS' MOTION TO STRIKE IS DENIED. NO HEARING ON THIS MATTER WILL BE HELD (LEWIS V. SUPERIOR COURT (1999) 19 CAL.4TH 1232, 1247.), UNLESS A NOTICE OF INTENT TO APPEAR AND REQUEST FOR ORAL ARGUMENT IS TRANSMITTED ELECTRONICALLY THROUGH THE COURT'S WEBSITE OR BY TELEPHONE TO THE COURT AT (530) 621-6551 BY 4:00 P.M. ON THE DAY THE TENTATIVE RULING IS ISSUED. NOTICE TO ALL PARTIES OF AN INTENT TO APPEAR MUST BE MADE BY TELEPHONE OR IN PERSON. PROOF OF SERVICE OF SAID NOTICE MUST BE FILED PRIOR TO OR AT THE HEARING. LONG CAUSE HEARINGS MUST BE REQUESTED BY 4:00 P.M. ON THE DAY THE TENTATIVE RULING IS ISSUED AND THE PARTIES ARE TO PROVIDE THE COURT WITH THREE MUTUALLY AGREEABLE DATES ON FRIDAY AFTERNOONS AT 2:30 P.M. LONG CAUSE ORAL ARGUMENT REQUESTS WILL BE SET FOR HEARING ON ONE OF THE THREE MUTUALLY AGREEABLE DATES ON FRIDAY AFTERNOONS AT 2:30 P.M. THE COURT WILL ADVISE THE PARTIES OF THE LONG CAUSE HEARING DATE AND TIME BY 5:00 P.M. ON THE DAY THE TENTATIVE RULING IS ISSUED. PARTIES MAY PERSONALLY APPEAR AT THE HEARING. IF A PARTY OR PARTIES WISH TO APPEAR TELEPHONICALLY THEY MUST APPEAR BY "VCOURT", WHICH MUST BE SCHEDULED AND PAID THROUGH THE COURT WEBSITE AT www.eldorado.courts.ca.gov/online-services/telephonic-appearances. MATTERS IN WHICH THE PARTIES' TOTAL TIME ESTIMATE FOR ARGUMENT IS 15 MINUTES OR LESS WILL BE HEARD ON THE LAW AND MOTION CALENDAR AT 8:30 A.M. ON FRIDAY, JUNE 24, 2022, EITHER IN PERSON OR BY VCOURT TELEPHONIC APPEARANCE UNLESS OTHERWISE NOTIFIED BY THE COURT.

10. WASHBURN V. WASHBURN PFL 20200663

TENTATIVE RULING # 10: ON THE COURT'S OWN MOTION, SET THE HEARING TO CONTINUE THE REQUEST FOR ORDERS ON FRIDAY, JULY 8, 2022, AT 8:30 A.M. IN DEPARTMENT NINE.